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HISTORY OF THE HOLOGRAPH TESTAMENT IN THE CIVIL LAW [1]

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ART. 970 of the French code states: "Le testament olographe ne sera point valable, s'il n'est écrit en entier, daté et signé de la main du testateur: il n'est assujetti à aucune autre forme." [3]

This article has a long and interesting history.

I. ROMAN LAW

Studying the development of the formalities required for a will we observe that legislators are inclined to facilitate such formalities. The oldest will of the Roman law was that made by a special statute,[4] the *testamentum in comitiis calatis*. In this assembly a *paterfamilias* appointed his heir by solemn words and the assembly voted its consent. The complexity of this procedure and the fact that such meetings gathered but twice a year led to a new mode of executing a last will, the *testamentum per aes et libram* [5] which

[1] The outline of this article was commenced in Vienna. The *Lenel* collection of Louisiana State University Law School enabled me to finish this work.

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[3] Art. 1588 Louisiana Civil Code of 1870 provides: "The olographic testament is that which is written by the testator himself.

In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State."

[4] Radin, *Handbook of Roman Law*, p. 400.

[5] Gaius, 2, 102, 103.

was shaped after the model of the mancipation, i. e. the solemn ritual of buying and selling: The *paterfamilias* transferred his property (i. e. the title to it) to a *familiae emptor*, the " buyer " of the estate and, after the former's death, the latter had to carry out the details of the orders. Later the *familiae emptor* was nothing more than a witness and not unlike the testamentary trustee of the common law.[6] However, this still somewhat formal will *per aes et libram* likewise disappeared.[7]

It was the praetor who created or at least permitted a new form of will. He granted to any person who could produce a document furnished with the seals of seven witnesses (their knowing about the contents of the will was not required; the mere knowledge that the document—*tabulae*—was a will was sufficient) *bonorum possessio secundum tabulas*, the possession of the estate according to the will.[8]

Moreover, so-called privileged testaments were known under Roman law for which a minimum of formality was required. Among all these, only the " *testamentum parentum inter liberos* ", usually called the descendant testament, is of interest to us, because the other more or less formless wills, such as " *testamentum tempore pestis* ", " *rure conditum* ", " *testamentum militare* " [9] were restricted to conditions outside of the normal life. The descendant testament, however, certainly is privileged but it is still an ordinary one, to be distinguished from the—privileged or non-privileged—extraordinary ones. We find the first exceptional wills in favor of descendants in a *constitutio* of the co-emperors Diocletian and Maximilian in 293 A. D.[10] It provided that directions concerning the division of the succession among the descendants should be valid in any form, even if they were given neither by testament nor by codicil. Constantine the Great stated more definitely in 321,[11] that a father

[6] Radin, *op. cit.*, p. 401.

[7] Very interesting is Otto Lenel, " Zur Geschichte der Heredis Institutio ", pp. 120-142 in Sir Paul Vinogradoff, *Essays in Legal History* (1913).

[8] Sohm, *Institutionen*, 17. ed. by Mitteis and Wenger, pp. 564, 590-592.

[9] Wills executed in times of plagues, or by peasants, or soldiers.

[10] Re-enacted in *Codex Justinianeus* 3, 36, 16: ". . . sed si tam circa testamentum quam etiam codicillos iudicium eius deficiat, uerum quibuscumque uerbis uoluntas eius declarata sit, licet intestata ei fuerit successum. . . ."

[11] The text is to be found in *Codex Theodosianus* 2, 24, 1: ". . . Quod vero ad huiusmodi spectat scripturas, in quibus talis defunctorum fuisse mens invenitur, ut de testamento intellegatur tantummodo cogitatum, etsi repugnare ius videatur, huiusmodi quoque conscriptiones inter suos dumtaxat

may make a holograph will in favor of his heirs (*sui heredes*),[12] which would have been void under the previous law. This regulation, concerning family fathers as regards their children only, was extended by Theodosius II in 439[13] to the mother (grandmother), providing, however, that this informality is valid only so far as descendants are concerned and therefore invalid as to dispositions in favor of strangers (*extranei*); such portion of the inheritance shall devolve upon the children by the right of accretion. (The words "*testamentum imperfectum*" refer to the imperfect form only, not to the validity of the contents of the will.) The difference between testaments according to civil law and merely praetorian ones was abolished.

The above-mentioned constitution of Constantine was broadened on the occasion of its reception into the *Codex Justinianeus*. The favor was now granted not only so far as a father's *sui heredes* were concerned, but also as to emancipated children, and to the will of a mother. Moreover, the text of Constantine's regulation (321) in the *Codex Theodosianus* (438) spoke only about testaments; but now, in the *Corpus Juris* (second Codex: 534), codicils, letters, and scripts of any kind are mentioned.[14]

And a few years later, in Justinian's *Novella 17 cap. 7*, the descendant testament again is mentioned: one may even let somebody else write the will and the testator or his children (!) may sign it.

Finally, the matter was regulated by Justinian's *Novella 107*.[15]

heredes valere oportet, quemadmodum scripturae simpliciter incoatae quas nulla sollemnitas adminicula defendunt, solis nixae radicibus voluntatis."

[12] I.e., the "agnatic" descendants of the deceased: children and children of a pre-deceased son, all these persons, however, if they are not emancipated at the time of the death.

[13] *Cod. Just.* 6, 23, 31, 3: ". . . Ex imperfecto autem testamento uoluntatem teneri defuncti nisi inter solos liberos a parentibus utriusque sexus habeatur, non uolumus. Si uero in huius modi uoluntate liberis alia sit extranea mixta persona, certam est etiam uoluntatem, quantum ad illam dumtaxat permixtam personam pro nullo haberi, sed liberis adcrescere."

[14] *Cod. Just.* 3, 36, 26.

[15] Cap. 1: "Nos igitur omnia clara et aperta consistere volentes (quid enim si proprium est legum sicut claritas, maxime super defunctorum dispositionibus?) volumus; si quis litteras sciens inter filios suos voluerit facere dispositionem, primum quidem eius praescribere *tempus*, deinde quoque filiorum nomina *propria manu*, ad haec uncias in quibus scripsit eos heredes, non signis numerorum significandas, sed per totas litteras declarandas, ut undique clare et indubitate consistat."

Because of the uncertainty of former legal conditions, the Emperor stated definitely the formalities of a will *parentum inter liberos* in order to avoid further discussion on that subject. For such a will, he required that "first" the date[16] and then the names of the children should be written by the testator in his hand, as well as the several portions of the inheritance, using no figure symbols. The signature of the testator is not required, nor is it necessary that the other contents of the will be written by the testator himself.

Hence, the final situation under Roman law was that holograph wills were restricted to descendant testaments.

Yet it would be incomplete not to mention another kind of holograph will which was very important for further development, outside the codified Roman law. After the *Codex Theodosianus*, the most important pre-code before Justinian's compilation, was edited in 438,[17] the West-Roman co-emperor Valentinian III inserted an amendment (one of the so-called Post-Theodosian *Novellae*) in the year 446[18] and in any case *permitted the holograph will.* The incident which caused this decisive step is explained in the text of the amendment itself: A distinguished lady, Mikke, was not able to execute a will properly since she had no witnesses at her disposal. Nevertheless she instituted a Madame Pelagia as heir and conveyed the document to her nephew, the noble Caesario. After her death, the latter gave the will to the heir who, however, was too modest to accept the inheritance unless the emperor would give his consent. The emperor did not hesitate to declare the will valid and to issue the amendment. The amendment also gives the reason for favoring this kind of will.[19] It states that it often

[16] "πρῶτον μεν αὐτῆς προγράφειν τὸν χρόνον" is the original Greek wording. But it cannot be doubted that the date should stand also at the end of the document.

[17] In effect since 439 for both the western and the eastern part of the empire after ratification by Valentinian III. It contained the imperial *constitutiones* from Constantine the Great up to date. Cf. Kuebler, *Geschichte des roemischen Rechts,* p. 383).

[18] *Theodosiani libri XVI,* volumen II: *Leges novellae ad Theodosianum pertinentes* (ed. Mommsen et Meyer), *Novellae Valentiniani III, nov. XXI,* 2.

[19] "Ne tamen huius statuti salubritatem generi negemus humano, mensura ingiter lege decernimus, ut quisquis per holografam scripturam supremum maluerit ordinare judicium habeat liberam facultatem . . . Late viam supremis aperimus arbitriis: si holografa manu testamenta condantur, *testes necessarios non putamus* . . ."—Valentiniani III, *nov.* XXI 2, 1.

happens that there are no witnesses available especially in case of an emergency; moreover, it may happen that one is prevented by others from publicly executing the desired will. These very important considerations led to the establishment of the principle that any testament written by the testator's hand is valid, and no signature, either of witnesses or of the testator himself, nor any date is required.

This kind of will was the extreme point reached by the law of the Romans. Justinian did not put it into the Digest or the Code; his *Novella* regulating the matter finally, recognized the holograph will, as we have seen, only as far as ascendants and descendants were concerned. The amendment of Valentinian III had provided something that was too new to the customs and habit of the Romans who were accustomed to solemnity in legal acts of great importance.

Thus, after Justinian the old forms of will remained in that part of the empire where his law dominated. However, the *Novella* of Valentinian III was of great influence in the further development of law outside the Roman-Byzantine empire and we may consider it the first regulation permitting a holograph testament similar to modern laws. We now turn to a study of this influence and of its results.

II. France

Copies of the *Codex Theodosianus* were brought very soon into the Gaul provinces. Prior to that time, however, the barbarians had conquered several parts of the Roman empire. The Visigoths had settled between the Pyrenees, the Loire and the Rhône; the Burgundians in the territories near the Loire; the Franconians in Belgium. The *Codex Theodosianus* was adopted by the Visigoths in an assembly of their chiefs and bishops in the year 488.[20]

At this point, it seems to be necessary to say a few words about legal conditions then.[21] The Germanic [22] tribes followed the principle of personal status: the law is attached to and follows the person. Thus a Roman, even if living in a Germanic state, comes

[20] Giraud, *Essai sur l'histoire du droit français en moyen âge,* I, 222 et seq.; Beaune, *Étude Historique du droit Coutumier Français,* I, 109.

[21] Heinrich Brunner, *Grundzuege der deutschen Rechtsgeschichte,* 8. ed. (edited by von Schwerin), p. 33-4.

[22] This word is preferable to "Teutonic", as the Teutons' origin, whether "Teutonic" or not, is uncertain. Compare Webster's definition of "Teutons".

under Roman law[23] although the Germans within the same state have to obey their Germanic law. Western Rome's end had come. In its place stood the kingdoms of the East Goths (Italy), the Visigoths (Southwestern France, later Spain), the Burgundians (Eastern France), and the Franks (Belgium, later France). These peoples desired to have friendly relations with their Roman subjects. Their kings not only had codes made for the Germans, but they compiled or even codified the laws of the Romans, too. As a consequence, one finds in these countries one set of laws for the Germans and another for the Romans—at least at first; it was a matter of course that this condition could not last very long.

After the previously mentioned adoption of the *Codex Theodosianus*, together with Valentinian III's amendment, Alaric II, king of the Visigoths, issued the *Breviarium Alaricianum* or *Lex Romana Visigothorum* in 506, which is a selection from the *Codex Theodosianus* and other laws.[24] It was a code for the use of the Roman part of the population. We note that this compilation, too, adopted the holograph testament from the *Novella* of Valentinian III. We find, indeed, in the *Lex Romana Visigothorum* not only the re-written wording of that amendment but also, in the official *interpretatio*, an explanation of the reasons for this institution.[25]

It is not only in the laws of the Visigoths that we discover this unmistakable proof of the adoption of the holograph will. We find it also in the *Lex Romana Burgundionum* of about 520. This was a real code (for the exclusive use of the Romans in the Burgundian kingdom),[26] and not a mere compilation of extracts like the *Lex Romana Visigothorum*. It contained parts of the Roman *Codices Gregorianus, Hermogenianus* and *Theodosianus* together with the *novellae* to the latter, Gaius, Paulus, and Germanic law. The holo-

[23] This doctrine was of utmost importance for the development of the law of the Church as the latter fell under Roman law.

[24] *Lex Romana Visigothorum* (ed. Haenel.)

[25] *Lex Romana Visigothorum* (ed. Haenel.), *Novella Valentiniani III*, titulus IV *de testamentis* c. 2, official "interpretatio": "Haec lex licet alia replicet, quae in aliis legibus habentur exposita tamen hoc amplius observandum esse praecipit, ut, si cui fuerit testandi voluntas, et testes forsitan defuerint, voluntatem suam propria manu perscribat, quae prolata post defuncti obitum plenam obtineat firmitatem."

[26] *Lex Romana Burgundionum* (ed. L. R. de Salis)—*Monumenta Germaniae Historica, Legum* sectio I, vol. II.

graph testament was a part of this code just as it was in Valentinian's amendment.[27]

Hence we see that both the *Lex Romana Visigothorum* and the *Lex Romana Burgundionum* do not require any other formalities save writing by the testator's hand. Neither law requires a date or even a signature.

Among the Germanic elements of these nations the situation was very different. They had no holograph wills, because testaments were not known to them at all.[28] Thus there are no traces of that institution in the so-called *leges barbarorum* (the laws for the Germanic population of the new Kingdoms), neither in the *Lex Eurici* of about 475 (for the Germanic Visigoths), nor in the *Lex Burgundionum* (for the Germanic Burgundians) of about 500, nor in the laws for the Franks. It was another kind of disposition *mortis causa* that was known to the Germans[29] which, however, is not to be analyzed in this article.

We can easily follow the traces of the holograph will in the next period. In the middle of the 7th century the famous *Lex Visigothorum*[30] was edited, which, later known under the name of *Fuero Juzgo*, was an important source for the law of Spain and, therefore, also of Louisiana.[31] This law, in effect for both the Roman and the Germanic population, was compiled from Germanic customary law and the *Lex Eurici*, the *Lex Romana Visigothorum*, the *Codex Theodosianus*, and the canons of the Church.[32] It was such an outstanding work that one may call it "a real code in the modern sense",[33] even though Montesquieu[34] ridicules it. This *Lex Visigothorum* now adopted, besides the solemn oral testa-

[27] Tit. XLV, 1: "Testamenta si per olographum manum fiant, probata manus veritate, sine testibus integram capiunt firmitatem."

[28] Tacitus, *Germania*, c. 20.

[29] Schwerin, *Grundzuege des deutschen Privatrechts*, p. 320 et seq.

[30] *Leges Visigothorum* (ed. K. Zeumer)—*Monumenta Germaniae Historica, Legum* sectio I, tom. I (1902).

[31] Tucker, *Source Books of Louisiana Law*, p. 37. See below, Part III.

[32] Waitz, *Abhandlungen zur deutschen Verfassungs- und Rechtsgeschichte*, p. 391 et seq.

[33] "Un vero codice nel senso moderno"—Pertile, *Storia del diritto italiano*, I, 129.

[34] *Esprit des lois*, livre 28, c. 1.

ment, also the holograph one,[35] but with an important legalistic improvement. The document had to be written entirely, dated and signed by the testator's hand. Moreover, the holograph will had to be examined after the testator's death by an official in the presence of two witnesses who had to check and confirm the authenticity of writing and signature. This examination was to be done within six months after the will was found and within thirty years after the deceased's death. These careful and particular provisions prove that, up to that time, the holograph will was quite commonly used among the "Visigoths" (who were, in fact, at the time of the *Lex Visigothorum* Spaniards with Romanic language and habits). Besides this, the *Lex Visigothorum* permitted also a testament in case of peril[36] without date and signature.[37]

As stated above, neither the holograph nor any other will was known to the Franks at first. It was in the *Epitomae*[38] where this institution was first permitted. These *Epitomae* were collections of various extracts from the *Lex Romana Visigothorum* edited in the 9th and 10th century. They adopted the holograph will with almost the same words as the *Lex Visigothorum*, as a comparison shows.[39] Thus, only writing by the testator's hand was required and no other formality except date, signature, and examination after the testator's death.

To this point we have been able to trace the law of holograph wills (not actually executed wills), but from now on up to the

[35] Liber 2, titulus 5, lex 15: "De olographis scripturis: Quia interdum necessitas ita sepe concurrit ut sollemnitas legum libere complari non possit, adeo, ubi qualitas locorum ita constiterit, ut non inveniantur testes, per quos iuxta legum ordinem unusquisque suam adliget voluntatem, manu propria scribat ea, que hordinare desiderat; ita ut specialiter adnotetur, quecumque indicare voluerint, vel que de rebus suis habere quemquam eligerint. Dies quoque et annus habeatur in eis evidenter expressus. Deinde, toto scripture textu conscripto, rursum auctor ipse subscribat."

[36] This fact is overlooked by W. Brock, *Das eigenhaendige Testament*, p. 13.

[37] 2, 5, 12: "Qualiter firmentur volumtates eorum, qui in itinere moriuntur. In itinere pergens aut in expeditione publica moriens, si ingenuos secum non habeat, volumtatem suam propria manu conscribat".

[38] Conrat, *Geschichte der Quellen und Literatur des roemischen Rechts im Mittelalter*, p. 222 et seq.

[39] *Epitome Aegidii*, 4, 2; *Epit. Guelpherbytana*, 4, 2; *Epit. Lugdunensis*, 4, 2; *Epit. Monachi, Epit. S. Galli.*

beginning of the 14th century we do not find them in any source previous to the codification of the *Coutumes*. And we do not know how and where from this mode of making a will they came into the *Coutumiers* after having disappeared for centuries. Were the holograph testaments directly adopted from Valentinian's *Novella* to the *Codex Theodosianus*, from the " leges barbarorum ", or from the later Germanic customary law? The prevailing opinion, advocated by de Ferrière,[40] is that the holograph will came from Valentinian's *Novella*; but he does not explain just how this happened. Warnkoenig and Stein [41] are of the opinion that the institution derives from the " *testamentum parentum inter liberos* " (the abovementioned descendant testament) which was created by Diocletian and Constantine and finally regulated by Justinian's *Novella 108*. But neither do these authorities give sufficient reasons for their statement. Brock [42] thinks that the holograph will derives from the *Lex Romana Visigothorum* but has no better proof for his opinion than the long validity of that compilation in France. Furgole [43] says that the *Coutumes* took the holograph will partly from Diocletian-Justinian's descendant testament and partly from Valentinian III's *Novella*. None of all these authorities explain the absence of such testaments for 400 years.

Let us now attempt to solve this problem.

In 475, shortly after the *Novella* of Valentinian III, we find in France a testament actually executed in this manner. It is the will of St. Perpetuus, bishop of Tours, executed in the Touraine. It commences with the invocation of Christ, which was a mode that was later used also by the Franks and which one never misses in the Merovingian or Carolingian period: [44] " In nomine Jesu Christi, amen. Ego Perpetuus pecator ... " and ends with the following words: " ... Testamentum hoc, manu propria scriptum relegi et subscripsi ego Perpetuus calendas maias post consulatum Leonis Minoris " (this will, written by my own hand, was re-read and

[40] Claude de Ferrière, *Coutume de Paris*, (2. ed.), IV, 74.

[41] Warnkoenig und Stein, *Franzoesische Staats- und Rechtsgeschichte*, II, 492.

[42] *Das eigenhaendige Testament.*

[43] J. Furgole, *Traité des testaments I.*, chap. II, section II, n. 18.

[44] J. M. Pardessus, *Diplomata, chartae, epistolae, leges ad res Gallo-Francicas spectantia*, I, 49: " Testamentum Perpetui Turonensis episcopi, quo de rebus suis post mortem suam distribuendis statuit " (Anno 475).

signed by me, Perpetuus, on the first of May in the year of the consulate of Leo Minor). The said testament was executed and signed in duplicate. Although we have a proof here of the existence of a holograph testament at that time we probably cannot presume that this form was very frequently used. In spite of the fact that the provisions of this form of will were adopted in the *Lex Romana Visigothorum*, the people continued to use the old forms. (It has been said [45] that this was due to lack of civilization, for it is obviously necessary to be able to write in order to execute a holograph will. If this were stated for the time from the 10th to the 12th century there would be some truth in it, but not for the 6th century where the Roman population [we remember that the *Lex Romana Visigothorum* was in effect for the Romans only] though not of high civilization was educated enough to read and write. It is much more likely that the people's custom of adhering to old ways and habits is the reason for the scarceness of holograph wills.)

Before long, the *Lex Romana Visigothorum* was used all over France and influenced also Italy.[46] It was in force during the whole Frankish period (till 887), even till the 12th century when it was gradually superseded by the newly discovered legislation of Justinian. There are many proofs of the extensive recognition of this code. Firstly, we find very often the words " Lex Romana " in documents and sources of the Frankish period which do not mean anything else but the said *Breviarium*. The collections of *capitularia* [47] contain quotations from this compilation.[48] Savigny [49] proves that the *Lex Romana Visigothorum* operated in the 11th century. Fitting [50] shows that a regular law school education was given in France of the 12th century.[51] In the records of the Synod

[45] Auffroy, *Evolution du testament en France des origines au XIII me siècle*, p. 44.

[46] Pertile, *op. cit.*, p. 101; for contrary arguments, see Haenel, *Lex Romana Visigothorum*, Introduction, p. 91 et seq.

[47] *Capitulare* was in the Frank period the name for an ordinance or a regulation issued by the king.

[48] Savigny, *Geschichte des roemischen Rechts im Mittelalter*, II, 104 et seq.

[49] P. 502.

[50] *Heimat des Brachylogus*, p. 25 et seq.

[51] Conrat, *Epitome exactis regibus*, p. 188 of the preface.

of Beauvais (1114) passages from that old Gothic Roman law are quoted.[52]

Yet, the mere fact that the *Lex Romana Visigothorum* was known up to the 12th century is not a sufficient basis for the opinion that the holograph will was adopted from that law 300 years later. We could say as well that the *droit coutumier* took that kind of will directly from the *Codex Theodosianus*, since this code was, beside the *Breviarium*, also in use among the Romans particularly in Northern France during the Frankish period. We do know, indeed, of many (non-holograph) wills from that earlier period which were made according to Roman law using words and forms known only to the *Codex Theodosianus* itself or contemporaneous writings of jurisconsults. There is the will of Bishop Remigius of Rheims, of 533,[53] which mentions the "praetor" and is dated according to the year of the "consul". We see the wills of St. Caesarius, Bishop of Arles (542),[54] of St. Aredius of Attane (573)[55] and of Bishop Bertram of Mans (615)[56] which were made in the same manner. We find a will of a woman named Burgundofara of the *Pays de Brie*, dated 632,[57] that contains even the words "under the Theodosian law". Two wills have formalistic words which derive from Gaius' *Institutes*: First the testament of a distinguished lady Erminethrudis of Paris (700)[58] the horrible Latin of which reads: "Ita do, ita ligo, ita testor, ita vos mihi, Quiritis, testimonium perhibetote testanti; citeri citeraeque proximi proximeque, exheredes mihi estoti; proculque habetote."[59] (Thus I give, bequeath, leave, thus you,

[52] Conrat, *Geschichte der Quellen und Literatur des roemischen Rechts im Mittelalter*, pp. 29, 79.

[53] Pardessus, *op. cit.*, I, 118: "Ego Remigius, episcopus civitatis Remorum, . . . testamentum meum condidi jure *praetorio* atque id codicillorum vice valere praecipi, si ei juris aliquis videbitur fuisse . . . Actum Remis die et *consule* praescripto. . . ."

[54] Pardessus, *op. cit.*, I, 139: "Et ideo juxta hanc epistolam, quam manus nostre subscriptione roboravimus, cuique die et consulem subtus adjecimus, Deo dispensante, hoc testamentum meum condidi, vel manu propria subscripsi, atque jure pretorio, vel jure civili, et ad vicem codicillorum firmavi. . ."

[55] Pardessus, *op. cit.*, I, 180.

[56] Pardessus, *op. cit.*, I, 230.

[57] Pardessus, *op. cit.*, II, 257: ". . . In lege quoque Theudosiana ut est insertum. . . ."

[58] Pardessus, *op. cit.*, II, 452.

[59] Compare Gaius, 2, 193 ff.

Quiretes, shall give testimony to me who makes her will; the others, men and women, next relatives either male or female shall be exheredated " to me "; keep aloof.) And the will of one Iddana of Artegia (690) preserved in fragments only, has the same language:[60] " Ita do, ita lego, ita testor, ita . . . munium tanti ceteri ceteraeque, proxemi, proximaeque . . . habetote." In Marculf's formulae[61] we find a joint will executed " according to the Roman law ".

Also after the collapse of the Visigoths' kingdom,[62] Roman law, i. e., both the *Breviarium Alaricianum* and the *Codex Theodosianus* remained in force in France, and the Frankish kings, e. g. Chlothar (I or II),[63] Charles the Great, and others, permitted the use of either code.[64] The collections of *capitularia*[65] have quotations from the *Codex Theodosianus* which are not to be found in the *Lex Romana Visigothorum* or in Justinian's compilations.[66] This *Codex* is again mentioned in *Glossarium Salomonis* (919) and in *Vocabularium Papias* (about 1050). The Theodosian law was not only known but was also applied. It may be doubtful whether it was in permanent uninterrupted use, but it is established that it was operating, for example, in the Auvergne in the 11th century.[67] We find it even in an *ordonnance* of 1269: " Ordonnance notant

[60] Pardessus, *op. cit.*, II, 413.

[61] *Marculfi Formularum* (in *Formulae Merowingici et Karolini aevi* [ed. K. Zeumer], liber II, 17): ". . . testamentum nostrum condedimus, quem illius notaris scribendum comisemus, ut, quomodo dies legitimos post transitum nostrum advenerit, recognitis sigilis, inciso lino, ut Romane legis decrevit auctoritates. . ." See also *ibid.*, *Formulae Visigothicae* n. 21 et seq., *Collectio Flaviniacensis*, n. 8.

[62] In 722, when the Arabs conquered Spain in the battle of Xeres de la Frontera.

[63] *Monumenta Germaniae Historica*: *Capitularia Regum Francorum* (ed. Boretius et Krause), I, 18 et seq., art. 4: " Inter Romanus negutia causarum romanis legebus praecepemus terminari." (There is a controversy whether Chlothar I or II issued this constitution. See Praefatio to it in the quoted edition.) Comp. also *ibid.*, *Lex Gundobada*, 45, 2.

[64] Dom Devic et Dom Vaisette, *Historie de Languedoc*, I, 530.

[65] Edition cited above, n. 63. See also in particular the spurious capitularies in the collection of the imaginary Benedictus Levita (ed. Knust, *Mon. Germ. Hist., Leges*, II).

[66] Savigny, *op. cit.*, II, 104.

[67] Beaune, *Etude Historique de droit Coutumier français*, I, 81.

d'infamie ceux qui auraient par des vils moyens . . . Conformément à la loi *de ambitu* au Code Théodosien."

Thus, the odds would be about the same that the *droit coutumier* adopted the holograph will either from the Roman Visigothic or from the Theodosian law. But this is only a mere possibility —not more; and it does not explain the absence of documentary proof of any actual holograph will for many hundred years. Other theories are likewise not convincing.[68]

The theory which tries to explain the origin of the holograph will from the *testamentum inter liberos* is not conclusive at all. Not that Justinian's legislation was unknown at the time of the codification of the *Coutumes*; on the contrary, the reception of Roman law began previous to this codification.[69] But the characteristics of both institutes are entirely foreign to each other, with respect to formalities as well as to the contents. Moreover, the *Coutumes*, although written in the 15th and 16th centuries, i. e., after the reception of Roman law, contained in fact nothing but the customary law of the time previous to the renaissance of the *Corpus Juris*. Hence it is unlikely that our form of will derives from the descendant testament of Justinian's *Codex* and *Novellae*.

We have said that we have a proof of the existence of one holograph testament from the 5th century; [70] but we have no evidence of any other one from a later period. (It is to be emphasized that the other above-mentioned testaments, quoted to prove the operation of Theodosian and Visigothic Roman law, are not at all holographic ones, but were executed in the presence of five to seven witnesses. The will of Bishop Bertram of Mans,[71] for instance, was even written by a notary and signed by seven witnesses and states that all this is required by the law.) [72] The Church favored the execution of wills. At first, we saw, dispositions *mortis causa* in the forms of wills were unknown to the non-Roman part of the population of the new kingdoms, but from the 8th century it became more and

[68] E. de Rozière, *Recueil général des formules usitées dans l'empire des Francs du Vème au Xème siècle.*

[69] Dom Devic et Dom Vaisette, *Historie de Languedoc* I, Preuves, p. 49; Savigny, *op. cit.*, I, 134; Giraud, *op. cit.*, I, 230.

[70] See note 44.

[71] See note 56.

[72] ". . . Ut lex edocet septem virorum honestorum subscriptionibus et sigillis credidi muniendum. . . ."

more usual to execute wills especially in favor of the Church which, indeed, fostered their execution. Yet we do not find any holograph will during that period in spite of the fact that they were permitted by the *Breviarium* and the *Lex Romana Burgundionum*. On the contrary, we find that the number of witnesses gradually increased up to twelve and even twenty-two; and the will of Rudolfus, Archbishop of Bourges (860), was signed by not less than forty-three witnesses.[73] It is very unlikely that so formless a will as the holograph testament should have been in general use at the same time.

Let us be aware of the fact that the *Coutumes* are not the continuation of either the Germanic *leges barbarorum* or the *leges Romanorum*; nor are they a mere composition of both laws, for we find other institutions in the *Coutumes* which derive from neither source. In fact, the *Coutumes* are a mixture derived from various sources of law such as: the *Codex Theodosianus*, the *leges barbarorum*, the *leges Romanorum*, laws which originated in the beginning of feudalism, special laws issued by the kings and by the various princes of the later middle ages, municipal charters, and last but not least the Canon Law. The influence of the law schools which were established then [74] is of great importance, too. However, only those parts of the law were codified in the *Coutumiers* which were preserved and changed by *use among the people*.

The first steps towards the making of the *Coutumiers* were the so-called *chartres de villes*, i. e., municipal charters and statutes. One finds them in the 11th century, like the *Coutumes de Bigorre* of 1097, and they became quite common in the 13th century.[75] In spite of the fact that many of these local statutes mention the institution of wills, we do not find a single word about the holograph one. The same is true of the sources which we have from the 13th and 14th century. Beaumanoir, *Coutumes de Beauvoisis*,[76] writes only of canonical testaments [77] and private testaments exe-

[73] *Cartulaire de l'Abbaye de Beaulieu*, published by Maximin Deloche, Charta I.

[74] Bologna, at the end of the 11th century; Padua (1222); Naples (1224); Perugia and Pisa (13th century foundations). Cf. H. Rashdall, *The Universities of Europe in the Middle Ages* (new ed., by F. M. Powicke and A. B. Emden, 3 vols., Oxford University Press, 1936).

[75] Giraud, *op. cit.*, Pièces, vol. I.

[76] Vol. I, ch. XII.

[77] N. 405.

cuted in the presence and with the signature of witnesses.[78] All this means that holograph wills were entirely obsolete during the feudal period of the end of the middle ages. However, we meet this form of will in almost all of the codifications of the *pays de droit coutumier* of the early 16th century.[79]

We, therefore, draw the following conclusion: The holograph will derives neither from Valentinian III's *Novella* to *Codex Theodosianus*, nor from the *Lex Romana Visigothorum* or *Burgundionum* nor from the *Lex Visigothorum* (*Fuero Juzgo*); but it seems to be obvious that *this form of will re-originated customarily among the people* and was, as a recognized custom, written into the compilations of customary law. The gradual popularization of testaments and (therefore) the permission of various forms of wills may be considered a proof of this.

The making of wills became more popular between the 12th and 15th century than it was ever before. The Church favored wills, for they contained chiefly religious legacies at first. Although, after the end of the 13th century, the number of dispositions of non-spiritual character increased gradually, the legacy for religious purposes still remained the essence of the disposition *mortis causa*. The priests used their whole influence in order to induce the people to dispose in favor of the Church and at times it was considered a sin if anyone died without having bequeathed something to the Church. We find this specially in the wills registered in the "Parlement de Paris",[80] e. g. "non voulant de cestuy mortel monde

[78] N. 371. See also: Pierre de Fontaines, *Le Conseil* (ed. M. J. Marnier), ch. XXXIII; *Les Olim* (published by le Comte Beugnot); Bouteiller, *La Somme Rural* (ed. L. Charondas le Caron), titre CIII; *Les Livres de Jostice et de Plet* (published by Rapetti), titre I; *Les Etablissements de St. Louis* (published by Viollet), vol. II, livre I, ch. XCIII; *Règles Coutumières*, 1st series, art. 58.

[79] See: *Coutumes de Paris* (1510), art. 96; *Coutumes generales du Bailliage d'Amiens* (1507-67), litre III, art. 55; *Coutumes de Troyes* (1509), litre VI, art. 97; *Coutumes de Chaumont en Bassigny* (1509), chap. VI, art. 84; *Coutumes de Lens* (1495), art. 82; *Coutumes d'Auxerre* (1507), chap. X, art. 92; *Coutumes du pays et comte du Maine* (1508), art. 292; *Coutumes d'Anjou* (1514), art. 276; *Coutumes du pays de Poictou* (1514), art. 276; *Coutumes de Vitre en Partois* (1509), chap. VI, art. 99; *Coutumes de Meleun* (1497), art. 91; *Coutumes de Chartres* (1508), chap. XVII, art. 90.

[80] *Testaments enregistrés au Parlament de Paris sous le règne de Charles VI* (published by Tuetey).

décéder intestat, mais voulant de tout son pouvoir remédier et pourveoir au salut de l'âme de lui...".[81] With few exceptions the wills of that period contain such clauses, from which we may infer that it had become unusual to die *ab intestato*. It sometimes occurred that priests refused to join the funeral ceremonies after learning that the deceased had left no will and therefore no disposition in favor of the Church: " Tout homme qui mourait sans donner une partie de ses biens â l'église, ce qui s'appelait mourir déconfés, était privé de la communion et de la sépulture " reports Montesquieu.[82] Such things happened up to the 16th century.[83] In consequence of this, it became more and more common, that, if anyone died without a will, the heirs themselves, in order to satisfy the cleric, made a " will " acting as if the deceased had made it; such " testament ", of course, contained legacies in favor of the Church.[84] Thus, we see that testaments were so common then that it was quite unusual to die without having made a will.

What was common was no longer solemn. The frequency of wills caused their facilitation. It should be recalled that it was the Church itself that supervised the making and execution of wills;[85] and it is a matter of natural development that it gradually permitted any form of will, even quite informal ones, if only the

[81] *Ibid.*, p. 426; see also pp. 373, 457, 505, 564.

[82] *Esprit des lois,* livre 28, ch. 41; see also Ch. Lefebvre, *L'ancien droit des successions,* I, 188, 9. [One should not omit to notice the aims which ecclesiastical courts and laws had in insisting on the making of wills. A chief aim was to oppose the rapacity of feudal lords who claimed the right to confiscate the chattels of intestate vassals. An attempt at such confiscation was made in Wales as late as the reign of Edward VI. A second aim was to guarantee restitution for injustice and especially for usury. A third aim was equally beneficial to the public and to the soul of the deceased, that is, the desire that the deceased should provide for charity. The struggle against the lords and the usurers was bitter and sanctions were necessary if the attempts of ecclesiastical law to intervene effectively were not to be rendered nugatory, even to the extent of the denial of Christian burial. It is not pretended that this denial determined the man's eternal destiny. It was a penalty in the external forum. Cf. Hannan, *The Canon Law of Wills* (Philadelphia: The Dolphin Press, 1935), nn. 455-464, 711-719.—Ed.]

[83] See: *Les Coutumes de Nivernais par Guy Coquille* (published by Dupin), p. 422.

[84] Montesquieu, *ibid.*

[85] See *Coutumes de Beauvaisis,* I, n. 320.

authenticity could be proved. At first [86] the testator was permitted to write the will in his own hand but it had to be signed by two witnesses and a notary. They needed, however, not to know the text of the will so that the dispositions could remain secret, a fact which is stated in some of the *Coutumes* themselves.[87] After a while the requirement of the witnesses' signature was forgotten; only their presence was required. This later custom was also favored by the fact that the general safety was greater during this period when the kingdom enjoyed comparatively good order and security, than in feudal times. The *Coutumes de Bretagne* went one step farther: a will was declared to be valid if made without any witnesses. Such a will, however, had to be made before the testator's last illness; in case it was made during his mortal illness a notary and two witnesses were still required.

Finally, we find *Coutumes* which declare *expressis verbis* that no witnesses are necessary for a holograph will, as *Coutumes de Bayonne* (*Titre XI, art. 4*) [88] or *Coutumes de Chateau-neuf en Thimerais* (chap. 17, art. 112).[89]

Other *Coutumes* had a slightly different development, especially the one of Paris.[90] The *Coutume de Paris* was codified in 1510, but its pre-code, so to say, the *Grand Coutumier de France*,[91] was written by an author [92] of the 14th century. Now, *livre II ch. 40* of the latter runs: "En pays de droict escript, qui veult faire testament, de necessité il fault cinq ou six tesmoings; en pays coustumier deux ou trois suffiscent, et sans tesmoing aucun testament ne vault riens, non mie un testament escript de la propre main du testateur, s'il n'est chevalier, et qu'il soit en cas périlleux comme conflict de la

[86] *Les Coutumes du duché de Bourgogne par J. Bouhier* (1459), art. 66.

[87] *Nouveaux Commentaires sur les Coutumes de Berry par Thaumas de la Thaumasière,* t. 18, art. 9: "Que . . . voudra faire . . . *volonté secrette* . . . l'écrira de sa main. . . ."

[88] "Testament escript de la main du testateur, posé qu'il n'y ait aucun *tesmoin*. . . ."

[89] ". . . le tout de la main du testateur, san temoings. . . ."

[90] *Coutume de Paris, par Bourjon.*

[91] Ed E. Laboulaye and R. Dareste.

[92] Most likely by Jacques d'Ableiges, Bailli of Evreux in 1389, as L. Delisle ("L'auteur du Grand Coutumier") states in *Mémoires de la Société de l'historie de Paris,* vol. VIII (1881).

guerre ". Thus, we see that in that part of the country [93] holograph wills were permitted only if the testator was a nobleman and [94] in peril of his life. Probably this privilege was extended later to any nobleman without regard to any peril. At the end of the Middle Ages when the power of feudalism was broken,[95] the burghers of the cities adopted many of the privileges of the nobility. Hence, the use of holograph wills was generally permitted in the *Coutumes de Paris* of 1510.—

There are two facts that must not be overlooked when we consider the development of wills: Firstly, a general appointment of a universal heir was unknown to the *Coutumes*, with few exceptions.[96] Such appointment of heir was treated, in general, as a legacy of all the property disposable.[97] And here we have the second fact: The property one could dispose of *mortis causa* was restricted [98] and the larger part of it descended *ab intestato*. Testaments were therefore not so important in the *pays de droit coutumier* that the handwritten form should meet strong resistance. We now understand the general development: This mode of making a will, comparatively rare during the 14th and 15th, more frequent in the 16th and quite common in the 17th century,[99] had become a general custom among the population of the *pays coutumier*, the territories of the *Coutumes*.

Now, what was the development in the *pays de droit écrit* where Roman law [100] was used? In southern France, Roman Law, at first

[93] County of Paris.

[94] P. Viollet (*Histoire du droit français*) quotes this text incorrectly, saying ". . . s'il n'est chevalier ou qu'il soit en cas périlleux . . ." instead of ". . . chevalier et qu'il soit en cas. . . ."

[95] The economic forces at work in that period are well described in Tawney, *Religion and the Rise of Capitalism* (London, 1926).

[96] E.g., *Coutumes de Berry* (titre 18, art. 1), *Coutumes de Bourgogne* (titre 7, art. 3).

[97] E.g., *Coutumes de Paris* (art. 299), *Coutumes de Reims* (art. 285).

[98] *Coutumes de Paris,* for instance, permitted disposition only of one-fifth of the things the deceased had inherited, and the same did the *Coutumes d'Amiens* (art. 46, 47), *de Senlis* (art. 217-19), *d'Orléans* (art. 275, 292), *de Vallois* (art. 84, 86). Other *Coutumes* forbade any disposition of the real property, like *Coutumes de Normandie* (art. 414-427).

[99] Jean Marie Ricard, *Traité des donations et testaments,* I, n. 1480 et seq.; see also Charles Lefebvre, *L'Ancien droit de succession.*

[100] *Raison écrite* it was called by scholars—deservedly!

through the ante-Justinian codes, and after the reception of Roman law through the *usus modernus pandectarum*—an expression which is more correct than the English term "civil law"—was still in force, together with both *leges Visigothorum* (*Breviarium* and *Fuero Juzgo*). It is not always easy to decide just what territories belonged to the group of *pays de droit coutumier* and what to *pays de droit écrit*. The whole division is not a very exact one, for, as previously mentioned, Roman law was also in operation in the *pays de droit coutumier* and both territories had their *Coutumes*. The role of Roman law, however, was of greater importance in the southern parts of France, wherefore we may still adhere to this old classification.[101]

So far as the general history of testaments is concerned, we find the same development in the *pays de droit écrit* as in the *pays de droit coutumier* during the Frankish period and during the time of feudalism. But neither the formalities nor the contents of these wills are the same as those we have noticed in the *pays de droit coutumier*. It was the Roman law that operated almost unchanged (while the original Roman form of will became at last obsolete in the north). The right to make a testament was unrestricted. Every will had to appoint an heir. Everyone capable of making a will could dispose of his entire property. According to the principle "nemo pro parte testatus et pro parte intestatus decedere potest", no partial but only universal inheritance existed. Moreover, it was the Roman law of Justinian that was in force here, and not Valentinian III's *Novella* to the *Codex Theodosianus*. Therefore, in the countries of the "written law" the holograph will was allowed as an exception, such as wills in favor of descendants, or wills of soldiers, or those for religious purposes, but we do not find the ordinary holograph will here.[102] This is perhaps the strongest proof that our holograph testament does not derive from the Roman law. Where the latter was in force, the former was unknown.

The countries of the customary law, however, adhered to their holograph wills even at a later date, when the old *Coutumes* were replaced by new ones.[103] In places where holograph wills were not

[101] Which was already criticized in Thibaut's *Lehrbuch des franzoesischen Civilrechtes* (1841), p. 4.

[102] Lefebvre, *L'ancien droit des successions*, II, 28.

[103] Reformed *Coutume de Paris* (1580), titre XIV, art. 289; ref. *Coutumes Generales du Bailliage d'Amiens* (1567), t. III, art. 55; *Coutumes de Gaud*

recognized by the language of the respective *Coutume*, such form of will was used nevertheless by virtue of old custom and of the law of the adjacent territories.[104] The population was so used to and satisfied with it that an attempt was made to introduce it into the *pays de droit écrit*, too. In Louis XIII's *ordonnance* of 1629 [105] we find the following words in art. 126: "Les testaments appellez holographes, écrits et signés de la main du testateur, seront valables *par tout notre royaume*, sans qu'il soit besoin de plus grande solemnité: laquelle toutefois si elle y est apportée, n'y fera préjudice, non plus que le défaut qui s'y pourrait rencontrer des dites solemnitez si ledit testament est holographe." This ordinance, however, met with no success in the *pays de droit écrit*. These territories refused to recognize holograph wills and their *parlements* did not accept them. A letter of Monsieur d'Aguesseau of February 11th, 1737, gives the reasons for this refusal: [106] Wills are particular acts of importance and should, therefore, be executed in a solemn manner. The testator's unrestricted power to dispose of his entire property; the fact that Roman law permits one to write a testament at the age of twelve or fourteen and without his family's knowledge; the fear that somebody might dictate a testament to his or her spouse in favor of the latter; the fact that a man because of his feeble-mindedness, illness or old age might change, by writing a single line, his will previously made in a solemn and elaborate mode; finally, the uncertainty of the real and actual date of a holograph will—all these reasons are important enough not to change the formalities required in the territories of the "written law." Thus, the *ordonnance* of 1629 had no effect: The holograph will was, in general, not admitted in the *pays de droit écrit*. (However, in certain places in this part of France the holograph testament was, in fact, frequently used and gradually permitted by the authorities. It was disclosed by an inquiry in the 17th century that in the city of Toul, that mode of making a will had always been in use. In con-

(1563), Rubrique XXVIII, art. 1/6; *d'Adenarde* (1615), Rubr. XX, art. 1/1; *Touraine* (1559), art. 322; *Normandie* (1538), art. 413; and many others.

[104] Ricard (*ibid.*, n. 1491): "Les testaments holographes ont lieu non seulement dans les Coutumes qui n'en parlent pas, mais ils sont mesme admis de celles *qui ne sont pas directement contraires* et qui ne les rejettent pas expréssement ainsi qu'il a estè jugé par Arrest. . . ."

[105] *Recueil général des Lois et Arrêts fondé par Sirey*, XVI, 223 et seq.

[106] *Oeuvres de M. Le Chancelier d'Aguesseau*, IX, 448 et seq.

sequence of this, the *parlement* of Metz declared in 1654 such wills valid if made in Toul. Likewise, a number of holograph wills were recognized by the *parlement* for the province of the Lyonnais.)[107]

Some time later, in 1681, Louis XIV recognized[108] the holograph will if made during a voyage at sea.

To avoid trouble with the local authorities of the *pays de droit écrit*, Louis XV's important *ordonnance* of 1735, too, refrained from introducing the holograph will into the whole kingdom.[109] This *ordonnance*,[110] though explaining in the preamble that it was issued because of the great differences between the laws of the various provinces and the contrast between "French" and "Roman" law, stated in art. 20 that holograph wills shall be recognized only in those territories which had used that institution before ("l'usage des testamens, codicilles et autres dernières dispositions olographes continuera d'avoir lieu dans les pays et dans les cas où ils ont été admis jusqu'à présent"). In the *pays de droit écrit*, however, wills written by the testator's hand were ordinarily admitted only in case of the descendant testament, i. e., Justinian's *testamentum parentum inter liberos* (art. 16-18). Besides, holograph wills were permitted throughout the whole kingdom as soldier's testaments (art. 29)[111] and in case of pestilence (art. 35),[112] as under the law of the *Corpus Juris Civilis*. As to the form of such wills, when and where permitted at all, art. 38 provides: writing by testator's hand, signature, and date. (Incidentally, it is a remarkable proof of the primitive way of legal thinking even in the 18th century that art. 3 declares wills void which were executed in the form of letters, whereas up to this *ordonnance* such wills were—one should say as a matter of course — permitted in both parts of the country.[113] Démolombe[114] thinks that this prohibition was in effect for the

[107] See Ricard, *ibid.*, n. 1490.

[108] In the *ordonnance de la marine* (see *Recueil*, XIX, 282 et seq.).

[109] Lefebvre, *ibid.*

[110] *Recueil*, XXI, 386 et seq.

[111] ". . . de ceux qui servent dans nos armées. . . ."

[112] ". . . en temps de peste. . . ."

[113] J. Furgole, *Traité*, I, II, sec. VII, n. 17; Troplong, *Traité*, III, n. 125; Grenier, *Des donations et testaments*, II, n. 228.

[114] *Cours de code civil*, XXI, n. 125.

pays de droit écrit only, but Furgole,[115] the commentator of the *ordonnance*, insists that this rule operated in the entire kingdom. This seems to be the better view, since otherwise the *ordonnance* would have stated expressly that this provision should only be applied in the lands of written law.)

This *ordonnance* of Louis XV as amended by the same king in 1751 [116] was the last legal stage before the *grande révolution*. It is unnecessary to say that the remarkable difference between the law of the North and South in so important a point caused much trouble which is but too familiar to American lawyers: The main problem was, naturally, whether a resident of the territories of "written" law being accidentally in Paris (under the *droit coutumier*) could make a holograph will, or whether a resident of Northern France, while being in Marseille, could make such a will there,[117] and the like.

The Great Revolution, which changed so many things, changed the law of testaments, too. Dispositions *mortis causa* were no longer favored. The Citizens Tronchet, Mirabeau, and Robespierre considered such dispositions as something which had to be abolished by the revolutionary legislation, since men cannot command after their death, and human right, therefore, cannot be extended beyond the time of life. Freedom of making wills, they said, is one of the greatest misfortunes of humanity and society, since the accumulation of great capital in a few hands is caused by that institution. Deputies, Citizens Cazales and Saint-Martin, however, advocated maintenance of testaments. The Convention resolved on the 7th of March 1793 that "... the faculty of disposing of one's property *mortis causa* or *inter vivos* by contracts of donations be abolished; and in the future, the descendants shall have an equal portion of their ascendants' property." [118] Moreover, the law was vested with force retroactive to July 14, 1789, because many aristocratic parents had disinherited their children who had sympathized with the Revolution. However, wills were not completely abolished: The testator could dispose of one-tenth of his property if he had descendants, but not in their favor; and of one-sixth if he had none. The liberty of making wills was extended by Act of March 25, 1800

[115] *Ibid.*

[116] See *Recueil*, XXI, 246.

[117] See authors in note 113.

[118] Sagnac, *La Legislation civile dans la Révolution française*, p. 222 et seq.

and now the testator's right depended on the number of children he left behind him—the more he had the smaller was the portion of property he could dispose of.[119]

After the storm of the Revolution came the reaction. The legislative bodies, after the proposition of the First Consul, Napoleon Bonaparte, resolved upon disposition *mortis causa* on the 23rd Floréal of the year XI (May 13, 1803). The holograph form of will was permitted in all of France. This was one of the 36 decrees which, on the 30th Ventose XII (March 20th, 1804), was declared to be a part of one new code to be named *Code civil des Français.* Its article 970 has been quoted in the beginning of this treatise.

III. Louisiana

The legal history of no part of the United States, I think, is so interesting as that of Louisiana.[120]

Continuing our study of the history of holograph wills in certain countries, we are aware of the fact that the history of Louisiana law is not, as outsiders sometimes believe, just a colonial edition of the history of the law of France. Quite the contrary: French law governed this province but from 1685 to 1769 when Spanish law was introduced by Don Alexander O'Reilly, the Captain General. O'Reilly's code expressly repealed all French law.[121] The law of Spain remained in force thereafter,[122] even after the Louisiana purchase.[123] Most of the provisions of the law of 1769 had, how-

[119] Sagnac, *op. cit.*, p. 349 et seq.

[120] Treatises: J. H. Tucker, *Source Books of Louisiana Law* (composed of four articles in *Tulane Law Review,* 1932-35, but reprinted with own pagination); H. P. Dart, "The Place of the Civil Law in Louisiana"—*Tulane Law Review* (1930), 163-77; A. M. Magee, "Civil Law in Louisiana"—*Law Library Journal* (1929), 5-8; G. Ireland, "Louisiana's Legal System Reappraised"—*Tulane Law Review,* XI (1937), 585-98; H. S. Daggett, "A Reappraisal Reappraised"—*ibid.,* XII (1938), 12-41; R. L. Tullis, "Louisiana's Legal System Reappraised"—*ibid.,* XII (1938), 113-9; E. Fabre-Surveyer, "The Civil Law in Quebec and Louisiana"—*Louisiana Law Review* (1939), 649-64; K. A. Cross, *A Treatise on Successions* (1891); and others.

[121] See Moreau Lislet and Henry Carleton, *The Laws of Las Siete Partidas* (1820), I, p. xx; *A Republication of the Projet of the Civil Code of Louisiana of 1825* (1937), vol. I, p. v; *Beard v. Poydras,* 4 Martin 348, 368 (La. 1816).

[122] Also during the twenty days of French government in December, 1803.

[123] Tucker, *Source Books,* p. 5; *Cottin v. Cottin,* 5 Martin (Old Series), 93 (La. 1817); *La Croix v. Coquet,* 5 Martin (New Series) 527 (La. 1827); *Berlucheaux v. Berlucheaux,* 7 La. 539, 534 (1835).

ever, actually been superseded in later years even before the statute of 1828 [124] which expressly repealed the Spanish law in force theretofore: Don O'Reilly's law was replaced insofar as it regulated matters provided for in the Louisiana Civil Code of 1808.[125] This latter code was revoked by the Code of 1825 (art. 3521) and a repealing statute of 1828; [126] and the Code of 1825 was replaced by the one of 1870. The law of wills was, of course, one of the subjects the Code of 1808 dealt with. Therefore, we need not dwell upon the question to what extent the provisions of O'Reilly's code and other Spanish law remained in force beside the Code of 1808.[127] which called itself "A digest of the civil law now in force in the territory of Orleans," however, " with alterations and amendments." The holograph will was introduced or rather re-introduced by the Code of 1808, as we shall see, and no attempt has ever been made or could logically be made to interpret away this institution because of its inconsistency with the provisions of the Spanish law.

For the purpose of this article we have to distinguish between the following periods:

(1) The French period [128] (1685-1769) which we find to be divided into two parts, before and after 1712.
(2) The Period of Spanish law: [129] 1769-1808.
(3) The Codes: since 1808.

(1) The French who settled the new territory around and above the Delta lived under French law. This statement as such, however, does not give a *prima facie* answer to an inquiry as to whether holograph wills were legally in existence, since we have seen that the civil law of France was not uniform on that subject. Thus we have to ascertain whether *la Louisiane* was a *pays de droit*

[124] Louisiana Acts of 1828 (adopted March 25), section 25.

[125] Section 2 of the promulgating act of March 31, 1808. See, however, *Hayes v. Berwick,* 2 Martin 138, 140 (La. 1812); *Cottin v. Cottin,* 5 Martin (O. S.) 93, 94; Tucker, *op. cit.,* p. 45.

[126] Louisiana Act 40 of 1828, p. 66.

[127] See above note 125.

[128] I.e., the time when Louisiana was French and French law was in force there.

[129] I.e., the time when the king of Spain was the ruler (1769 to Nov. 30, 1803), as well as the brief government by the French Republic (till December 20, 1803) and the time of the U. S. domination thereafter.

écrit or *de droit coutumier*. (This search would, of course, be unnecessary if by some special act or decree the holograph testament would have been introduced into or excluded from Louisiana. But this is not the case.) We shall see that Louisiana was a territory governed by the Customary Law.

The first settlers of Louisiana were from 1685 on, according to Barbe-Marbois,[130] under the jurisdiction of agents of the Paris police. Yet it cannot be found out with certainty what law concerning the forms of wills was to be applied, because there are no decrees or court decisions available which might deal with this problem. In view of the fact, however, that Parisian officials were the authorities in those, so to speak, pre-historic days, there seems to be little doubt that, if ever this question was of importance in the days before 1712, the *Coutume de Paris* was the legal source. In 1712 (September 14) royal *lettres-patentes* [131] clarified the situation: "Nos édits, ordonnances et coutumes et les usages de la prevôté et vicomté de Paris, seront observés pour lois et coutumes dans ledit pays de la Louisiane." [132] In the absence of any provision to the contrary, that part of the *Coutume*, too, became the law of the land which, as we have seen,[133] sanctioned the execution of holograph wills. How that actually worked in Louisiana, we do not know, since we have no court decisions from that time.[134]

(2) French law was put to an end by O'Reilly in 1769.[135] The law he promulgated was that of Spain and her colonial empire, chiefly the *Código de las siete partidas* and the *Recopilación de las Indias*.[136] These laws did not permit holograph wills.

The foundation of all Spanish law [137] is the *Lex Visigothorum*, or *Fuero Juzgo*, of the end of the 7th century, with which we have

[130] "Histoire de la Louisiane"—*Recueil général des anciennes lois françaises*, XX (1686-1715), 576.

[131] *Recueil général*, p. 576-82.

[132] Sec. 7—*ibid.*, p. 580.

[133] See above after note 95.

[134] Tucker, *op. cit.*, p. 65.

[135] See at note 121, and especially Dart, *op. cit.*, p. 165.

[136] Dart, *op. cit.*, p. 166; Tucker, *op. cit.*, p. 39.

[137] The handiest edition of all Spanish codes prior to the present Civil Code is still the one by Marcello Martinez Alcubila, *Códigos antiguos de España* (Madrid, 1885).

dealt above.[138] It tolerates and regulates the execution of wills that are merely written and signed by the testator. The subsequent codifications and compilations,[139] however, mention it no longer. *Fuero viejo* does not deal with wills. *Fuero real*, 3, 2 (" de las mandas "), re-enacting the law of wills, seems at least to exclude holograph testaments by describing the formalities necessary for a valid will: A " scriba " has to write and seal the document.[140] No witnesses, however, were required nor did the law answer the question as to the validity of such a scribe's own testament. At any rate, the almost simultaneously appearing *Siete partidas* expressly demanded seven witnesses and a notary for the execution of a will, and five witnesses for a mere codicil.[141] We shall not attempt to search for the reasons of this development, since it has been interrupted and superseded both in Louisiana and subsequently in Spain itself [142] by the adoption of the modern French provisions permitting holograph wills. For the same reason, as pointed out above, we need not dwell upon the much discussed question to what extent Spanish law has remained in force beside the codes. This problem obviously can arise only when the codes are silent upon a certain question of law; and this is not true of the formalities of wills in general and of holographic ones in particular.

(3) The Louisiana Civil Code of 1808 contained the following provision (third book, second title, art. 103):

" The holograph testament, or codicil [143] is that which is made and written by the testator himself without the presence of any witness. It may be either open or sealed; but when it is sealed it needs no other superscription than this or words equivalent ' This is my olographic will or codicil ',[144] which superscription must be signed by the testator.

[138] See at and after note 30.

[139] Such as *Fuero viejo de Castilla* (1212, not 992 as Tucker [*op. cit.*, p. 38] states), *Fuero real* (1252), *Las siete partidas* (1265), *Leyes del estilo* (1310), *Nueva recopilación* (1567), and *Recopilación de las Indias* (1680).

[140] " Todo home que ficiere su manda fagelo por escripto de mano de los Escribanos. . . ."

[141] *Tercera partida*, tit. XVIII, ley 103-4.

[142] Art. 676, 691-3, Spanish Civil Code.

[143] " Or codicil " is not included in the French original.

[144] " Or codicil " is not included in the French original.

"An olographic testament shall not be valid, unless it be entirely written, signed and dated with the testator's hand. It is subject to no other form. Yet it is prudent to deposit it with a notary to prevent its being purloined, though its not being deposited will not make it void, if it be acknowledged and proved as hereinafter directed."

This was a strange child of modern French jurisprudence![145] Questions arise upon a mere glance at the law, such as: What superscription, if any, is required in the case of open wills? What is the purpose of this provision—does its violation invalidate the will? From the style of the second paragraph we can see that the codifiers disliked the institution: The will shall *not* be valid *unless* —instead of declaring that such wills *are* valid *if* they comply with the following rules. Yet the law, awkardly phrased as it was, indicated great progress.

The redactors of the Civil Code of 1825, Livingston, Lislet, and Derbigny, proposed to abolish the entire institute in spite of their otherwise very close adherence to the French *code civil*. The article as they drafted it read:

> "The olographic testament is that which is written by the testator himself.
>
> "In order to be valid, it must be entirely written, dated and signed by the hand of the testator, and must have the signature of two witnesses, to whom the testator must have declared that the paper which he offers them to sign is his testament.
>
> "It is subject to no other form, and may be made any where even out of the state.[146]

The reason for this attempt to turn the clock back were stated by the drafters as follows:[147] "It appears to us, as the art of counterfeiting writings has been carried to such an extent, that it is no longer safe to admit as certain a testament, which has no other

[145] See Tucker, *op. cit.*, pp. 4, 5, 40, on the question whether the so-called *Code Napoleon* or one of its *projets* formed the model for the Code of 1808. As to our holograph wills provision, we can be sure that its awkwardness did not grow in the brains of the French jurists.

[146] Additions and Amendments to the Civil Code of the State of Louisiana, proposed by the Jurists Commissioned for that purpose, 1823, reprinted in *Louisiana Legal Archives,* I (1937), 213-4.

[147] *Ibid.*

proof of its verity than the handwriting of the testator. A testament may be made in one or two lines. Is there not reasonable ground for apprehending that the hand-writing may be so well imitated as to deceive those who are best acquainted with it? We have seen persons whose writing has been so well counterfeited that they could not distinguish their own from the counterfeit with a sufficient degree of certainty to be able to affirm which they had written. How much more reason is there to apprehend deception in the handwriting of a man who cannot declare whether the writing be his or not. To be beyond the reach of this danger, we require that the olographic testament should have the signature of two witnesses . . . " Which would have meant the abolition of the holograph will, for a testament which has to be signed by witnesses is no longer holograph. (Holograph means, of course, *merely* holograph.)

It would be superfluous to argue with this opinion—now, after hundreds of years of holograph wills in parts of France and Italy as well as in Austria,[148] and several decades in most European countries and in some of the United States—since the legislation did not follow this advice but adopted the holograph testament from both the previous code and the French model.[149] The Code of 1825 deviated from the former by doing away with the useless provision containing the superscription, the statement that it may be open or sealed, the emphasis that it is " made and " written by the testator, and the advice to deposit it with the notary. It followed the 1808 model in that it has a legal definition (which the French Civil Code does not have); and it adopted from the *projet* the last sentence pertaining to conflicts of law.

It would be interesting to deal with some of the leading cases on our subject,[150] but this would lead us far beyond the scope of our article which is historic rather than dogmatic.

IV. Other Countries. Austria

The other countries of Europe and beyond the seas (Quebec) which enacted the French code adopted, without exception, also the holograph will.[151] Many, if not the majority, of those coun-

[148] See below.

[149] Art. 1581 (identical with the present art. 1588, above note 3).

[150] Particularly in comparison with French decisions.

[151] Heinsheimer in: *Die Zivilgezetze der Gegenwart. Frankreich. Code civil* (ed. by Heinsheimer, Martin Wolff, Kaden, Merk, Gutzwiller, Illch,

tries which do not belong to the French law-family adopted from the French law that institution, which considers the need of the poorer classes, such as Spain, Sweden, Switzerland and many others. The German Empire, too, was one of the countries that took, in section 2231 of its Civil Code of 1896 (in force since 1900), the holograph will from the Civil Code of France with, however, the rather impractical difference that, in order to be valid, it requires that the will must also refer to the place of its execution. Hence a holograph will, written on the testator's firm paper which has the address in print ("Leipzig, den ...") is void unless the testator had added the place in his own hand. Before that code, such wills were unknown to the old Germanic law and customs as well as to Pandect law (civil law) and the Prussian code.

Other countries, however, had a development independent yet similar to that of France, e. g. certain Cantons of Switzerland[152] and especially Italy.[153] It would lead us too far afield to investigate the development in all these countries. But it may be permitted to describe the situation in Austria in a few words, because: 1.) The Austrian code of 1811 is, after the Code Civil, the second modern code in Europe;[154] 2.) The French Code was of no influence at all on the code of Austria, although it preceded the latter by seven years and was critically mentioned in the official "Introductory Report on the Austrian Civil Code" of January, 1808.[155] Thus we find two similar institutions in almost contem-

Schwartz), pp. xvi-xx, gives a good survey of the countries which either adopted the *code civil* itself, more or less changed, like Louisiana, Italy, Rumania, or issued codes of their own but considerably influenced by the French codification, like Portugal or Chile.

[152] See Huber, *System und Geschichte des schweizerischen Privatrechts.* IV, 620 et seq, and II, 189 et seq.

[153] See *Il digesto italiano,* vol. XXII, parte 3 (1889-97), p. 351; Lattes, *Il diritto consuetudinario delle Città Lombarde,* p. 262 et seq; Nani, *Storia del diritto privato italiano,* p. 580; Carlo Calisse, *A History of Italian Law,* p. 693; Pertile (*Storia del diritto italiano*), however, insists that the holograph testament in Italy has its roots in Valentian III's *Novella* to the *Codex Theodosianus.* The problem is not too interesting, since Italy has adopted the French Code (Codice civile of 1865); the new Facist code in preparation does not change the forms of wills.

[154] The Prussian code of 1793 was still primitive and cannot be mentioned in the same class.

[155] Heinsheimer, *ibid.,* p. xviii.

poraneous codes neither of which had any influence on the other. 3) It was the final destiny of Austria's law, too, to become the mother of a " law-family " like the French law and yet in a different way: After the Great War, when the Austro-Hungarian Monarchy [156] fell to pieces, its civil law was, in addition to the Austrian Republic itself, in force in a number of new or vastly enlarged countries, i. e., in parts of Yugoslavia, Rumania, Czechoslovakia, Italy (till 1929), and Poland. All these countries had been preparing new codes with the Austrian law as a basis (even Italy had been gradually introducing the outstanding Austrian system of land-books and land-registration) [157] — as long as law was not yet a meaningless term in Europe.

Austrians have used the holograph will for a long time. Its use was preserved by custom which can be seen by considering the compilations of customary law, the city charters, and the provincial regulations. We find the consent of Emperor Ferdinand I to the city charter of Vienna, 1526, which contained a provision for the holograph testament. It is mentioned in decisions in Lower Austria of the 16th century and it was in use in Styria and Upper Austria where it is mentioned in the " Landtafel " [158] as a " very old custom ".[159] The Bohemian city charters permit its use.[160] As to the form, generally writing by the testator's hand and his signature were required and in some places also a seal, whereas the date was not necessary. These requirements were gradually relaxed and, finally, some places did not require even a signature, while others considered the handwritten signature sufficient.

The Austrian pre-code of 1793, the Civil Code for West Galicia,[161]

[156] The Austrian code was operative only in certain parts of Hungary which were later ceded to Rumania and Yugoslavia.

[157] See for the development of Austria's civil law in old and modern times Armin Ehrenzweig, *System des oesterreichischen allgemeinen Privatrechtes* (2. ed.), vol. I, i, introductory part.

[158] I.e., a landbook for feudal estates.

[159] See for this and the following remarks: Pfaff und Hoffman, *Kommentar zum oesterreichischen buergerlichen Gesetzbuch,* sec. 578; Klang, *Kommentar zum Allgemeinen buergerlichen Gesetzbuch,* sec. 578.

[160] J. J. Weingarten, *Auszug der Koeniglichen Stadt-Recht im Erbkoenigreich Boeheim,* p. 94, section 1.

[161] This province, acquired during the partition of Poland, was the guinea-pig of the Austrian government. New codes were introduced there for a try-out such as a code of procedure and a criminal code.

provided in section 373 that a holograph will is to be held valid if written by the testator's hand, signed, sealed and dated.

The records of the discussion on the new code[162] show that (1794) it was planned to abolish the requirement of sealing but to insist upon the date. At the occasion of the revision in 1807, however, it was regarded as too harsh that a will should be invalid because of the lack of the date,[163] and therefore, section 578 was enacted in the following language: "Whoever intends to make a will in writing and without witnesses, must write the testament or codicil with his own hand and must sign it with his name in his own handwriting. The addition of the day, the year, and the place, at which the will has been drawn up, is, it is true, not necessary, but advisable in order to avoid disputes." This section with the precise first and the paternalistic second sentence has never since been changed but proved successful in all the countries where it is still operating.[164]

Wherever we find the holograph will, it is obviously a form of will which enables the poor to dispose of their effects without expensive formalities. It is much easier and more convenient to prove the authenticity of a handwritten document than to rely upon witnesses and their possible bad memory and false oaths.

[162] Ofner, *Protokolle*, zu § 587.

[163] See also Zeiller, *Commentar ueber das allgemeine buergerliche Gesetzbuch fuer die Oesterreichische Monarchie*, § 578, n. 1-3.

[164] The Nazis have not yet substituted the German code for the Austrian in the occupied or incorporated territories.

THE CONCEPT OF INVALIDATING LAWS*

WHILE the concept of invalidating laws could be immediately and definitely established by an investigation of the philosophy which underlies these laws, it might be better to approach the study of the nature of these laws from a consideration of their scope. The application of a law is a practical thing. Theory does not hinder this application, but it would be insufficient to know merely the nature of invalidating laws when one later realizes that the application of these laws is not always according to their nature. Law is not entirely philosophy. Hence, concepts which could readily be understood must sometimes be held in abeyance until the use of the laws developing from these concepts is carefully observed and adequately investigated.

In order, then, to establish the nature of invalidating laws, it has been considered useful to study the scope of these laws before actually determining whether they are penal or non-penal in nature. The study of the scope of invalidating laws will easily lead to a study of their nature. With this brief word of introduction, the two opinions on the scope of invalidating laws will be set forth.

Two opinions exist in regard to the scope of invalidating laws. The first opinion considers an invalidating law as covering any deficiency in the natural constitutive elements of an act.[1] Thus the lack of consent in entering a contract, or an inability to act by reason of age, or a prohibition as the result of a penalty can all be determining factors in identifying an invalidating law. The second opinion [2] considers an invalidating law as operating only when the

* This is the first of a series of four articles by the same author which will appear consecutively in the third volume of THE JURIST. Subsequent articles will appear in the following order:

"The Power to Enact Invalidating Laws"

"The Interpretation of Invalidating Laws"

"The Effect and Obligation of Invalidating Laws".

[1] E. g., Michiels, *Normae Generales Iuris Canonici* (Lublin, 1929), I, 267.

[2] E. g., Cicognani, *Commentarium ad librum I Codicis* (Romae, 1925), p. 89; Maroto, *Institutiones Iuris Canonici* (Romae, 1921), I, 222; Cocchi, *Commentarium in Codicem Iuris Canonici* (2. ed., Taurinorum Augustae, 1921), I, 88; Van Hove, *De Legibus Ecclesiasticis* (Mechliniae-Romae, 1930), p. 167;

natural constitutive elements of an act are actually present. Thus an act invalid by the law of nature would not be covered by an invalidating law. The same would be true whenever the divine positive law would intervene to render an act invalid or to render persons unable to act.

There is little doubt that, in a broad sense, any law that declares an act invalid is an invalidating law. However, not every act invalid by the law of nature or by the divine positive law is covered by the disciplinary law of the Church. It is true that certain canons of the Code do state a prohibition of the natural law or announce the definite will of Christ. Such canons as 968, § 1 and 1081 [3] are not matters primarily of discipline. Rather, they are items of theology and natural law and could be studied independently of any system of discipline. Hence to include such items as covered by invalidating laws would not, of course, be incorrect, but such inclusion would obviously interfere with any clear-cut analysis tending to investigate the nature of invalidating laws. The Code of Canon Law is primarily a collection of disciplinary laws; and distinctions, descriptions and analyses should, if possible, be based on this idea. Throughout this work, then, the second opinion mentioned above will be adopted in considering invalidating laws. Definite rejection of the first opinion is not intended, since The Code of Canon Law does consider acts invalid by divine law. But these canons will not be stressed in the present study as they do not entirely belong to a disciplinary code. It is useful to find these canons where actual discipline is regulated. Their inclusion in The Code of Canon Law assists toward obtaining a complete view of the subject to be studied. Yet in The Code of Canon Law discipline is stressed, and for this reason the first opinion mentioned above will be a less satisfactory guide than the second opinion.

An invalidating law can consider either the person performing the act, or it can consider the act performed. In both cases the legal effect of an act is denied. This is the meaning of an invalidating law expressed in simple terms. For sufficient reasons, the legislator renders a person unable to act or, if able to act,

Cappello, *Summa Iuris Canonici* (Romae, 1929), I, 60; cf. Graf, *Die Leges irritantes et inhabilitantes in Codex Iuris Canonici* (Paderborn, 1926), pp. 13-14; Zallinger, *Institutiones Iuris Naturalis et Ecclesiastici Publici libri V*, (Romae, 1823), lib. III, p. 228.

[3] Cf. also cc. 1068, § 1; 1069, § 1; 1076, § 1.

annuls his act. This is a legal item, and it has no direct reference to physical capacity or to possible damage involved. Moreover, no question of good or bad faith arises. It is conceivable that a person in the best of faith may act according to what he thinks is the law, and yet, despite his best intentions, his act is invalid. Or, a person may actually feel that he is excused from the rigorous requirements of an invalidating law, but if he acts without a dispensation from this law, his act is invalid.

The invalidity of an act that results from the transgression of an invalidating law is in no sense always to be considered a punishment.[4] It is true that a contract entered upon through simony is invalid.[5] This invalidity could reasonably be interpreted as a punishment for the crime of simony. Yet this law is only one of a hundred cases in which acts are declared by law to be null and void. In most of these cases the question of penalties does not arise.[6] It is necessary and fundamental to keep this idea in mind. Were the invalidity of an act always a penalty, it would fall under the interpretation of penalties. Therefore, for instance, many acts controlled by invalidating laws would be valid but rescindible. This is not true. Further, at times, ignorance of a penalty excuses from its incurrence, but such ignorance is no help in avoiding the effects of an invalidating law.[7]

There is some specious resemblance to penalties in invalidating laws. But this is only a specious resemblance, and, if the distinction between the two is not definitely made, confusion and incorrect interpretation will result. An analysis of the penal aspects of an invalidating law will be made later.

An invalidating law need not be expressed in prohibitory words. Many invalidating laws are, as a matter of fact, so expressed,[8] but this is not essential. If the legislator requires certain solemnities to surround the performance of an act, he states these solemnities in a positive way. The same is true, if certain conditions are laid

[4] Cocchi (*Commentarium in Codicem Iuris Canonici*, I, 90) says *ut lex irritans habenda sit poenalis requiritur expressam rationem poenae eam habere.*

[5] Cf. c. 729; cf. also c. 185.

[6] E. g., cc. 112; 116; 169; 170.

[7] Cf. c. 16, § 1.

[8] E. g., cc. 167; 1439, § 1.

down before a person can act validly. In these cases, the legislator states how he wants an act to be performed, or under what conditions he will recognize the act. In expressing his will, the legislator will use positive terms. He may, of course, add some injunctions in negative terms, but these will be at most a restatement or clarification of his will. Hence it will be an error to seek an invalidating law only when the law is expressed in prohibitory words. It is easy to make this mistake, because frequently an invalidating law is classed as a prohibitory law. Such classification is useful to set off the difference between laws that merely prohibit and laws that render an act invalid. To go beyond this and to limit invalidating laws to the class of prohibitory laws would be a serious error. Under the influence of such an error, one would be at a loss to explain how the lack of certain formalities could vitiate a testament or a religious profession.

As Michiels [9] warns, there is a difference between an "*irritating* law" (*lex irritans*) and an "*inhabilitating* law" (*lex inhabilitans*). The difference, however, is not to be found in the relative validity or invalidity of the act performed but in the aspect under which the invalidity of the act is determined. While this difference is important in itself and interesting to study, the effect of either law is the same. Nevertheless some description of these laws should be made. It will serve no useful purpose here to expatiate at great length in indicating how these laws coincide in effect. For practical purposes it is the legal recognition of an act or the absence of this recognition that is the important thing. Of course, it is necessary to know whether one is competent to act legally, just as it is necessary to know what formalities are required in order to act validly. But this study is not primarily to point out when a man is able or unable to act, or to show what formalities are essential to the act, but rather to consider and weigh the effect of an act performed contrary to the tenet of an invalidating law. However, it will not be remiss to outline the difference between "*lex irritans*" and "*lex inhabilitans*".[10]

An "*irritating* law" [11] (*lex irritans*) directly considers the act performed and denies it validity. Questions concerning the com-

[9] Michiels, *o. c.*, p. 268; cf. also Cicognani, *Canon Law* (revised edition, Philadelphia, 1935), p. 558.

[10] Cf. Graf, *o. c.*, pp. 17-21.

[11] Cicognani, *o. c.*, p. 558.

petence of persons to perform such an act are not considered. A law, for instance, that demands a certain form or that requires certain definite signatures applies to all who care to perform an act controlled by this law. An example could be found in Canon 1094.[12] According to this canon a marriage is valid only when it is celebrated in a definite way. This way is clearly indicated. Any deficiency vitiates the act. It does not matter in the least that the contracting parties are physically able and morally willing to enter marriage. They are bound to observe a definite form of marriage. If this form is ignored or only partially observed the marriage is invalid. In this way, the law directly considers the act performed and judges it valid or invalid according to the prescriptions of the law. This species of invalidating law presupposes the legal competence of persons who wish to perform an act. And the point to remember is that the act itself is considered and weighed, not the persons who perform the act.

An "*inhabilitating* law"[13] (*lex inhabilitans*) directly considers the person who performs or attempts to perform an act. This species of invalidating law establishes a legal incompetence. Again, it has nothing to do with a person's physical capacity or his moral willingness. Obviously, in judging the validity of an act, legal competence or legal incompetence to act is the first thing to consider. If a man is canonically unable to perform an act, his act, if it exists at all, must be invalid. Examples could be multiplied in The Code of Canon Law. One or two will suffice. Canon 1067, § 1,[14] forbids marriage under a certain age. In the law it is clearly established that this age must be arrived at before marriage can exist. Consequently, any one below this age is canonically unable to marry. It is an impediment that ceases in time, but, as long as it exists, it effectually invalidates any marital union. Another example: Canon 1077 forbids marriage to those within certain degrees of affinity.[15] This prohibition clearly establishes the for-

[12] "Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario vel sacerdote ab alterutro delegato et duobus saltem testibus, etc."

[13] Cicognani, *o. c.*, p. 558.

[14] "Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt."

[15] "Affinitas in linea recta dirimit matrimonium in quolibet gradu; in linea collaterali usque ad secundum gradum inclusive."

bidden degrees, so that an act contrary to this law is invalid. No choice or option is conceded in this kind of invalidating law. Circumstances do not alter the case. A person either is included or he is not included under the legal incompetence enacted by the law.

Naturally there is no intention here to exclude possible dispensations from either kind of invalidating law. Frequently this dispensation can be obtained. All that is intended here is a description of the operation of invalidating laws.[16]

While, as described above, there is a difference between "*irritating*" and "*inhabilitating*" laws, the two will be considered together in this study.[17] It would be a constant inconvenience and boring repetition to repeat these words. Nor would it be necessary, as the invalidity of the act performed is common to both laws. Usually, in using these laws it will be abundantly clear which one is meant. To indicate both laws the expression "invalidating laws" will be used. Whenever more detailed expression is required, it will be used.

The above description recalls what has been said about the scope of invalidating laws. These laws must be carefully understood. It would be unjust to deny a man a right to act under the law unless his incompetence can be clearly and unmistakably demonstrated. Similarly, it would be unjust to annul an act unless this invalidity can be rightly shown. A person, as a member of a society, possesses some rights but does not necessarily possess all rights. What rights are denied him should be just as clearly indicated as the rights conceded to him.

The nature of invalidating laws is clear enough today, but earlier canonists were not equally certain. The controversy concerned itself with the possible penal effects of an invalidating law.

[16] For dispensation, etc., cf. Reilly, *The General Norms of Dispensation* n. 119, The Catholic University of America Canon Law Studies (Washington: The Catholic University of America Press, 1939).

[17] Augustine, for instance, *A Commentary on the New Code of Canon Law* (3. ed., St. Louis: 1920), p. 84, uses the word "nullifying" to indicate both kinds of invalidating laws; Cicognani (*l. c.*), however, uses invalidating law for "*lex irritans*" and disqualifying law for "*lex inhabilitans*"; Cocchi says (p. 90): "ad leges irritantes reduci possunt leges constitutivae iuris, quae nempe ius aliquod constituunt vel conferunt"; as examples of such laws he gives "religious profession", "the rights of canons to distributions" and "the active and passive right in elections."

Opinions were divided. Some [18] canonists held that the invalidity of an act was a penalty even though this was not specifically stated. Other [19] canonists denied this penal aspect of an invalidating law and claimed that such a law was merely directive. No canonist, however, denied the existence of invalidating laws or questioned the power of the legislator to enact such laws. Suarez [20] who writes in detail of invalidating laws says he takes such laws for granted from their use both in civil and canon law. In fact, one of the evident items in both civil and canon law, both in history and in present use is the constant existence of invalidating laws. Controversies did occur regarding their nature, their identification and their application, but no one denied the existence of invalidating laws or seriously challenged the right of the legislator to enact such laws.

While the existence of invalidating laws was and is unquestioned, it will be interesting to see how earlier canonists viewed the nature of such laws.

In favor of the penal aspect of an invalidating law were some canonists of considerable weight.[21] Their opinions will be examined presently. But, in general, their arguments proceeded as follows: a grave inconvenience and harm is done to a man whose act is said to be invalid; therefore, such restriction to his natural liberty can only be considered in the light of a penalty. This penal aspect was predicated both in laws that declared a man unable to act and in laws that demanded certain formalities.

A corroborative argument was deduced from the interpretation of invalidating laws. This was the argument: if an invalidating law is not penal, then it ought not to be of restrictive interpretation; but, since such interpretation is common, it follows that an invalidating law is penal in nature.

[18] E. g., Glossa, Panormitanus, Bartolus, Baldus, Decius in Suarez, *Tractatus de Legibus ac Deo Legislatore* (Neapoli, 1872), lib. V, cap. XIX, n. 6.

[19] E. g., Joannes Andreas, Felinus Sandaeus in Suarez, *o. c.*, lib. V, cap. XIX, n. 3.

[20] Suarez, *o. c.*, lib. V, cap. XIX, n. 1.

[21] By "penal law" or by "penal nature of invalidating laws" is not meant the somewhat common use of these terms to indicate that the law carries no obligation in conscience to obey. A penal law in this latter sense is totally different from the "penal law" or "penal nature of invalidating laws" as employed in the text. The latter penal laws do oblige in conscience to obey.

To assert that an invalidating law is penal because it restricts freedom to act is to say that every prohibitory law is a penalty. Further, such restriction can be found in any law which regulates the public or the private order. It is essential in a regulation that some restriction be exercised. This will naturally involve surrender of such freedom to act which one would otherwise enjoy. Yet it would not occur to anyone that all these restrictions are penalties.

Further, if the grade of restriction in an invalidating law be urged as the reason why such a law should be considered penal, the reply is that the grade of restriction would not change the character of the law. The recognition which the legislator will accord an act in law depends on the reasons he has for the enactment of such a law. These reasons can range over a wide field and never, necessarily, include sanctions. If we suppose that the danger of fraud is the reason why certain formalities are required in a testament, the idea of a penalty would not be found in a law which controls the making of a testament. Normally, everyone is free to bequeath his property to whomsoever he wishes, but if these bequests are to be valid in law certain stipulations are demanded so that the free will of the testator can be proven. It is to guard against possible fraud or possible force brought to bear on the testator that the legislator insists that formalties be observed. It is, then, the possible crime of others which is restricted. This outweighs the restriction which is put on the testator so that the latter is obliged to make his testament in a prescribed way.

Or, again, if we suppose that a person is forbidden to act legally in a certain matter by reason of a law which declares him incompetent to act, there is no necessary connection with penalties.[22] It is true that certain acts will result in an impediment,[23] and this impediment can well be considered as a penalty for such an act. But this is merely to say that an invalidating law can at times be penal. There is no quarrel with this statement. Penalties take various forms and invalidity of certain acts can be understood as

[22] Pirhing says that invalidation is not properly speaking a penalty (*Ius Canonicum* [Dilingae, 1674], Lib. I, tit. II, sect. I, § 6 L): "irritatio actus proprie non est poena, quae supponit culpam, sed damnum quod ex legitima causa, etiam ab ignorante bona fide et invincibiliter sustinere debet." As an example, Pirhing offers the invalidation of contracts: the contract is invalid but there is no penalty for breaking the law.

[23] Cf. c. 1075; cf. Suarez, *o. c.*, Lib. V, cap. XIX, n. 8.

a penalty. However, invalidity of acts is not restricted to laws which punish crimes. Clerics in sacred orders, for instance, are forbidden to marry.[24] They are thus forbidden to marry not because of crime but because of their state in life. This prohibition to marry has attached to it an invalidating clause which does not operate until the law is disobeyed, but the reason for its existence is not found in disobedience to the law but in high regard for the clerical state.

Other examples might be adduced, but these will suffice.

The corroborative argument which was deduced from the interpretation of invalidating laws and purported to identify such laws as penal is the result of oversimplification. It is asserted that since invalidating laws are restrictively interpreted, they must be penal laws. The assumption is that only a penal law can be thus interpreted. This assumption ignores the fact that certain restrictions are found in all laws because the aim of all laws is to regulate. This regulation, as was mentioned before, is not necessarily a penalty but rather a means to establish and conserve order. It is conceded that invalidating laws do restrict, but these restrictions are for the sake of order, not for the punishment of a crime.

Yet, since invalidating laws do impose certain formalities to be fulfilled, or do actually establish legal incompetency to act, they must be interpreted strictly. There is no doubt that invalidating laws impose restraints on the natural freedom of man to act, and therefore these restraints are not to be presumed but must be proven. For the same reason, they must be interpreted strictly. No one could be reasonably said to surrender more freedom than the law demands. In this way, the interpretation of an invalidating law will proceed parallel with the interpretation of a penal law. But this is no justification for maintaining that an invalidating law is a penal law.

The canonists who maintained the opinion that an invalidating law was of penal nature appealed for support to several decretals. An investigation of these decretals will show whether any appreciable support can be found to maintain this opinion.

The first decretal to be studied was issued by Pope Innocent III.[25] This decretal is extremely important and furnishes a source

[24] Cf. c. 132, § 1; 1072.

[25] C. 20, X, *de rescriptis* I, 3.

for the law on rescripts. In this decretal Pope Innocent III distinguishes between the malicious suppression of truth or the malicious narration of falsehood and the non-existence of truth which results from a petition made in good faith. In this distinction the Pope says that if a rescript is obtained through fraud the grantee shall receive no benefit in penalty for his malice, and the rescript is null and void.[26] While the Pontiff expresses his mind as if he is actually punishing a crime, he is really indicating that without a sufficient reason in truth he will not grant a valid rescript. The mind of the Pontiff is clear that a relation must exist in truth before he will concede a favor. This is not surprising, for normally the general law will control the actions of men, and any exception must be based on truth. Pope Innocent III does not deny that he can, by reason of his own sufficient power, grant the favor requested, but in a rescript he is considered as moved by a truthful plea. When this plea is not in fact true, his benevolence cannot be abused. Consequently, rather than pressing the meaning of the Pontiff's words to indicate the penal nature of an invalidating law, it is fairer to interpret them as insisting on the requirements for the issuance of a valid rescript. Thus, if these requirements are not honestly met, the rescript is invalid. Pope Innocent III is applying the law of Pope Alexander III.[27]

It is true that Pope Innocent III does in the same decretal give a milder interpretation of the requirements for a valid rescript, where he says, in effect, if through ignorance a reason is proposed for the exercise of his benevolence, a further distinction must be made. If the suppression of truth or the narration of falsehood is such that if in fact truth had not been suppressed or falsehood narrated, the Pontiff would have conceded the favor, the rescript is valid. Otherwise the rescript is invalid. In this way, Pope Innocent III shows that he is willing to supply some deficiencies but not all. This is an exercise of his benevolence in suspending in some cases the requirements for the issuance of a valid rescript.

[26] "Qui . . . falsitatem exprimunt vel supprimunt veritatem, in suae perversitatis poenam nullum ex illis literis commodum consequantur."

[27] C. 2, X, *de rescriptis,* I, 3; cf. also the law of Pope Lucius III, cc. 7, 10, 11, X, *de rescriptis,* I, 3; Pope Innocent III also wrote to the Archbishop of Milan insisting on the requirements for a valid rescript; cf. c. 17, X, *de rescriptis,* I, 3; other decretals of the same Pope are found in cc. 22, 26 of the same title.

Indirectly, however, the Pontiff insinuates that these requirements are of law and must be met faithfully.[28]

In a word, then, this decretal of Pope Innocent III cannot be urged as entirely supporting the penal nature of an invalidating law. The words of the Pontiff do not necessarily mean invalidity is a penalty. They can be interpreted as indicating that the Pope will not supply any deficiency which results from bad faith.

Another decretal cited in favor of the penal nature of invalidating laws is a decretal of Pope Gregory IX.[29] This decretal need not be examined in detail because it does not indicate anything at all about the nature of invalidating laws. This decretal speaks of the abuse of a right granted through a rescript and establishes a penalty for this abuse. The penalty is the loss of the right granted through the rescript. Obviously this has nothing to do with the initial petition for and the actual issuance of the rescript. In order to deprive the grantee of his right, it is obviously necessary that the right be validly conferred. What happens later is something that in no way effects the issuance of the rescript. Hence, to allege this decretal as supporting the penal nature of an invalidating law is to misunderstand the purpose for which this decretal of Pope Gregory IX was issued. A penalty was certainly imposed in this decretal, but it was in no way connected with the issuance of the rescript.

A decretal of Pope Gregory X is also adduced in favor of the penal nature of invalidating laws. This decretal was promulgated in the second general Council of Lyons.[30] The decretal describes the local immunity of a church and speaks of various activities which are contrary to this immunity. Thus, for instance, clamorous gatherings of the people, markets and public meetings are forbidden to be held in the church. The decretal continues with a prohibition against the use of a church as a secular court room. In the latter prohibition, the Pontiff declares a judicial sentence pronounced in the church invalid.[31]

[28] Cf. De Angelis, *Praelectiones Iuris Canonici* (Romae-Parisiis, 1877), Lib. I, tit. III, pp. 67-69.

[29] C. 30, X, *de rescriptis*, I, 3.

[30] C. 2, *de immunitate ecclesiarum, coemeteriorum et aliorum locorum religiosorum*, III, 23 in VI°. An English translation of this decretal and of other decretals whose source is actually a general council can be found in "*Disciplinary Decrees of the General Councils*" by Rev. H. J. Schroeder, O.P. (St. Louis: Herder, 1937).

[31] "Processus iudicum saecularium, ac specialiter prolatae sententiae in eisdem locis omni carent robore firmitatis."

In order to understand the force of this prohibition, it is necessary to recall the scope of local immunities. A church possessing immunity was free of all secular control, and its administration and use were entirely in the hands of clerics. This meant that civil courts were entirely barred from any jurisdiction over the fabrics of the church, nor could they use the church as a place where legal sessions could be held. In other words, a church was not only an unsuitable place in which to hold a court, but it was actually exempt from such use. How far the civil power admitted such exemption is immaterial, for the Church considered herself competent to declare and interpret her own immunities. Hence, in theory at least, and to a large extent in fact the church was outside the range of civil jurisdiction. Consequently, Pope Gregory X could legally declare a judicial sentence invalid because it was not given according to the stipulations of the law. The Canon Law required permission of the competent authority of the Church before an immunity could be disregarded. If this permission were not obtained, the Church would not be obliged to recognize the judicial sentence of the civil court.

It must not be imagined that Pope Gregory X is infringing on the rights of the civil authority by declaring invalid a judicial sentence pronounced in a church. On the contrary, the Pontiff is urging the observance of civil law which recognized in part at least immunities.

If the decretal of Pope Gregory X be understood in this light, his declaration of the invalidity of the judicial sentence resolves itself into a demand that the stipulations of both canon and civil law be executed. Failing this, the Pontiff does not grant a dispensation from the canon law on immunities, and, therefore, he must declare the judicial sentence pronounced in a church invalid.

With this explanation of the decretal of Pope Gregory X, it is difficult to see where the penal nature of an invalidating law can be demonstrated. A penalty is a specific item, and it is not to be confused with the principal effect of an act. In the decretal under discussion, it is the lack of permission from a competent authority which vitiates a judicial act. The principal effect, then, of this defective act is invalidity. This is all that Pope Gregory X says. He states that the judicial sentence pronounced in a church is invalid. His reason is the exemption of the church from civil jurisdiction and from use as a court room. He is not punishing the

civil judge for disobeying the law on immunities by declaring his sentence invalid.

This argument is strengthened by the fact that nowhere in his decretal does Pope Gregory X inflict penalties on the violation of the Church. Not until the very end of his decretal does the Pontiff even threaten punishments. All through the decretal, the Pontiff speaks of the sanctity of a church and the great reverence with which it ought to be respected. He deplores the actual abuses which permit the church to be used as a popular meeting house. But he does not actually inflict penalties for these abuses. It is only when there is a conflict of jurisdictions and this matter has not previously been adjusted that the Pontiff makes his pronouncement on the validity of the judicial sentence. This can hardly be considered a penalty. Why should the Pontiff penalize this infraction of the law when he merely deplores the violation of the sanctity of the church? It seems far more reasonable to say that he maintains the judicial act is invalid because it is not pronounced according to the requirements of law.[32]

A decretal of Pope Boniface VIII is likewise adduced in favor of the penal nature of an invalidating law. This decretal concerns the election of a religious superior.[33] The case is easily outlined: A religious had been elected to an office outside of his own monastery or church and had neglected to obtain permission to accept this election. Without this permission, the religious had presumed to consent to his own election. Pope Boniface VIII declared the election invalid and said this declaration was in punishment of such presumption.[34]

An analysis of the decretal of Boniface VIII indicates that he is declaring the election of the religious invalid because it has not proceeded according to law. The prescription of law which required the permission of the superior of the religious had been neglected. Because of this neglect, the election is invalid. Thus, the decretal of Pope Boniface VIII is merely a declaration that certain formalities must be fulfilled if an act is to be accorded legal recognition. This is the principal idea in the decretal of Pope

[32] An earlier decretal on the prohibition of civil jurisdiction in a church can be found in c. 1, X, *de immunitate ecclesiarum, etc.,* III, 49.

[33] C. 27, *de electione et electi potestate,* I, 6 in VI°.

[34] ". . . in poenam praesumptionis illius electio eadem ipso facto viribus vacuetur omnino."

Boniface VIII. The way in which he expresses this idea is secondary. He does say that the election of the religious is invalid because of his presumption in consenting to this election without the permission of his superior, but the law would still operate even though this permission had been neglected in good faith. The most, then, that can be said of this decretal of Pope Boniface VIII is that it has a penal aspect. It would be pressing the actual words of the Pontiff too far to say that he is characterizing an invalidating law as penal.

In this decretal as well as in the earlier decretal of Pope Innocent III, the main features of the law are neglected to pick out definite words to support a contention. The context of these words is thus lost in the discussion of an issue. Obviously, this is not interpretation which proceeds in orderly fashion and according to rule.

The extreme care with which Pope Boniface VIII sought to have the prescribed conditions of law fulfilled completely is abundantly evident in several of his decretals. A brief review of these decretals shows that where an invalidating law is involved, conditions and formalities must be met or completed before the act is accorded legal recognition. In none of these instances is there any question of inflicting a penalty. An act is valid or invalid according to these prescriptions of law.

In discussing the eligibility of a monk to be elected an abbot, Pope Boniface VIII says definitely that the monk must be a professed religious before he can be elected.[35] The same monk, however, can be elected a bishop even before he has made his profession. Again, in discussing the election of an abbot to the Episcopate, Pope Boniface VIII approves of such an election, but he insists that the permission of the Apostolic See or its Delegate be obtained before the abbot can occupy his see.[36] Again, in discussing the effect of a Papal reservation of a benefice, Pope Boniface VIII is careful to point out that any election which may have preceded the reservation is valid, but every election after the reservation is invalid.[37] Pope Boniface VIII discusses all these points in the decretals mentioned, but never is there a sign of invalidating an election as a penalty for the infraction of the law. It is rather

[35] C. 28, *de electione et electi potestate,* I, 6 in VI°.

[36] C. 36, *de electione et electi potestate,* I, 6 in VI°.

[37] C. 45, *de electione et electi potestate,* I, 6 in VI°.

the non-fulfillment of the conditions of the law, or the lack of necessary qualities which vitiates an act. Thus, the invalidity of an act, according to Pope Boniface VIII, does not depend on crime or on fraud. Thus, too, the words of the Pontiff, which taken alone seem to indicate the penal nature of an invalidating law in the case of the religious who consented to his election without the permission of his superior, should be weighed.

There is, of course, no lack of instances in the decretals where a person is deprived of rights he had legitimately acquired.[38] But in every instance a valid act is presupposed, and the penalty is imposed because of abuse of this right. One instance might well be examined to show that as long as the proper formalities are observed no invalidity attaches to the act, but where an abuse exists, for instance, in assuming power before it is actually conferred, a penalty will be inflicted. The law to be examined was enacted in the second general Council of Lyons.[39]

According to this law, if a bishop began to administer his diocese before his election was confirmed, he was punished with the loss of the rights which he had obtained through his election. This was a penalty imposed for the non-authorized assumption of authority. By his election the bishop had not yet obtained the immediate rule of his diocese. He required the confirmation of this election. Until this confirmation was obtained, the bishop was without power to rule. Consequently, his intrusion into the administration of the diocese, either personally or by proxy, was an unwarranted act which deserved punishment. The Council punished such an act with the privation of any right which the bishop may have obtained through his election.

The second Council of Lyons was careful to point out that it included in its condemnation any attempt on the part of the bishop to consider himself, before the confirmation of his election, as the administrator of the diocese. This was characterized as blind avarice.[40] The law strictly forbade any bishop to thrust himself

[38] E. g., c. 43, X, *de rescriptis,* I, 3; c. 2, X, *de postulatione praelatorum,* I, 5; c. 16, X, *de regularibus et transeuntibus ad religionem,* III, 31; cc. 4, 11, X, *de privilegiis et excessibus privilegiatorum,* V, 33; c. 3, X, *de poenis,* V, 37; c. 2, *de censibus, exactionibus et procurationibus* III 20 in VI°; cf. also cc. 23-25, C. XXV, q. 2 (these latter examples are earlier than the decretals).

[39] C. 5, *de electione et electi potestate,* I, 6 in VI°.

[40] " Avaritiae caecitas et damnandae ambitionis improbitas aliquorum animos occupantes, eos in illam temeritatem impellunt, ut quae sibi a iure interdicta noverint exquisitis fraudibus usurpare conentur."

into the administration of the diocese before his election was confirmed. Every attempt to evade this prescription was fraud.

In this law of the second general Council of Lyons, despite severe penalties for unauthorized use of authority or for the employment of fraud, not a word is said about the validity of the election itself. It is presupposed a valid election.

It cannot, then, be insisted upon too strongly that an act may be valid, but the invalidity may attach to certain further acts performed on the alleged force of this valid act. This invalidity may even be a punishment which might even extend to the actual privation of rights obtained through a valid act. All the operations of law must be studied and kept in proper order. Confusion will result if any disorder in the way in which acts are to be performed is displayed. Every right which is conceded by law must be judged according to that law. Abuses are liable to punishment as is indicated by the example of the law of the second Council of Lyons.

While the canonists who maintained the penal nature of invalidating laws appealed to the Decretals for support, their basic reasons are found in Roman Law. A few words must be said here about the texts which are offered as the basis for the penal nature of invalidating laws. These texts have their place principally in the interpretation of invalidating laws. But they cannot be ignored in the discussion of the nature of invalidating laws. It should be remembered that these texts are Roman Law and need not necessarily have the same force either in the history or in the development of Canon Law. However, some principles of law are indicated and applied in these texts. Considering the great influence of Roman Law on the development of Canon Law, it is not surprising that concepts of Roman Law could and would be transferred to Canon Law.

The fundamental text in Roman Law upon which the penal nature of invalidating laws is said to be founded is a law of the Emperor Theodosius II.[41] This law enunciates a principle that verbal compliance with the law is not sufficient, but that the spirit of the law must likewise be followed. Theodosius II says there is no doubt that an offense against the law occurs if the text of the law is

[41] Novellae constitutiones Imperatorum Theodosii II, Valentiniani III, Maximi, Maioriani, Severi, Anthemii (Romae, 1844), tit. IX, ne curiolis praedium alterius conducat aut fidejussor conductoris existat.

observed but its spirit broken.[42] Therefore, as Theodosius II says, the same penalties are incurred if only the spirit of the law is broken through fraud.[43]

Theodosius II was led to enact his law because of the abuse of the text of the law. There is little doubt that the whole law of Theodosius II is an enactment to punish fraud, and the disabilities resulting from an infraction of his law are penal in nature. But it must be remembered that the occasion of the law of Theodosius II was a particular abuse. And, in so far as it controlled this abuse, the law of Theodosus II was a penal law.

However, Theodosius II did not stop with a law controlling a particular abuse. The Emperor went further. He declared every agreement and every contract contrary to the law invalid.[44] This broad principle attaching invalidity to every agreement or contract contrary to the law was even further extended. Theodosius II included under his law all interpretations of new and old law so that the prohibition of an act was sufficient to annul it if the act had actually existed.[45]

The law of Theodosius II is, in origin, penal, and there is a valid reason for saying that he meant his entire law to be equally understood as a penal measure. Between his statement that the neglect of the spirit of the law is equally reprehensible with a non-compliance with the text of the law, Theodosius II explains what led to the enactment of a general invalidating law. Theodosius can well be understood as punishing any infraction of his law on contracts, etc., with the penalty of invalidity.

But is the law of Theodosius II sufficient to show that an invalidating law is necessarily penal? The law of Theodosius II will not support this necessity. It is true that he does extend a penal law, enacted on the occasion of suppressing an abuse, to every agreement or contract contrary to the law. But this general law can well be

[42] "Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem."

[43] "Nec poenas insertas legibus evitabit, qui se contra iuris sententias scaeva praerogativa verborum fraudulenter excusat."

[44] "Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente."

[45] "Quod ad omnes legum interpretationes, tam veteres quam novellas trahi generaliter imperamus, ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat."

a preventive measure to forestall fraud. Undoubtedly, general laws which guard against fraud are founded on a particular instance of fraud, and the law intends to protect the citizen from a repetition of this case. Thus, formalities and solemnities are introduced as necessary safeguards. These safeguards, then, become means whereby the legislator can protect the common good. These safeguards become directive measures and are not necessarily penal, for even the ignorant disobedience to the law involves the invalidity of the act. This seems to be the force of the law of Theodosius II, for he declares every agreement or contract contrary to the law invalid. No exception is made for agreements or contracts drawn up contrary to the law but in good faith.

While this explanation of the law of Theodosius II may be satisfactory, the law itself must not be used to show the non-penal nature of invalidating laws. It would be improper to isolate the general law of Theodosius II and cite it as a support for the non-penal nature of invalidating laws. The law itself is too closely bound to the circumstances in which it arose to be separated and judged entirely as an independent item.

A law of Justinian is likewise urged as the basis for the contention that invalidating laws are penal laws.

The text of this law of Justinian repeats the law of Theodosius II almost word for word except in the part where Theodosius II explains his reasons for the enactment of the law.[46] Hence, the text of Justinian is a statement of the principle that the spirit of the law can not be neglected while the letter of the law is observed. The violation of one bespeaks the same penalties as the violation of the other. The same extension of invalidity to all agreements and contracts is made; likewise, the extension of invalidity in the interpretations of old and new law. In other words, Justinian cut away all connection with the suppression of an abuse in a particular case and enacted his law to cover all violations of the law on contracts. This operation of Justinian is important because his law can be studied without the constant fear that an actual abuse was the immediate cause or occasion of his law. Such fear would naturally, as in the case with the law of Theodosius II, cast some doubt on the accuracy of interpretation.

The pertinent citations of the law of Justinian need scarcely to be

[46] C. I, 14, 5. An English translation of this text is found in *"The Civil Law"* translated by S. P. Scott (Cincinnati, 1932), XII, 87.

written anew. With the exception of the part indicated above, Justinian's law is the same as the law of Theodosius II. But has Justinian's law better application to prove the penal nature of invalidating laws?

With the textual identity of the laws of Justinian and Theodosius II established, it would seem that the same interpretation should be accorded both laws. This, however, would not be accurate. Justinian takes the law of Theodosius II and makes it applicable to every violation, at least, of the law on contracts. Theodosius himself had done this, but this interpretation was not urged because the law was closely bound to the reformation of the abuse which gave it its existence. No such hesitancy is required in the study of the law of Justinian.

With this in mind, it is difficult to see that Justinian's law must be interpreted as supporting the penal nature of invalidating laws. There is nothing in the text of Justinian's law which necessarily demands such interpretation. On the contrary, the more reasonable interpretation, since Justinian himself dissociated his law from the infliction of a particular penalty, would be to maintain that the law applied to all cases of violation whether actual fraud existed or not.

The same remark can be made here as was made in regard to the law of Theodosius II. Undoubtedly, the law of Justinian was enacted to avoid and obviate fraud, but as it is worded no actual fraud need exist for an act to be invalid. All that is required for the invalidity to follow is for the act to be performed contrary to the law. Such contrary acts could be had in good faith where ignorance of the law supervened and prevented compliance with the law. Thus, the law of Justinian is an example of an ordinance which regulates the common good of the State. There is no necessity for interpreting this law as penal in nature.

In a word, then, neither the law of Theodosius II nor the law of Justinian can be shown necessarily to indicate the penal nature of invalidating laws. The law of Justinian is even less liable to such interpretation. These laws, however, do directly contradict the force of an invalidating law in Canon Law, as will be demonstrated in a later article on the interpretation of invalidating laws.[47]

[47] Cf. Suarez, *o. c.*, lib. V, cap. XXVIII, nn. 1-9. Suarez offers a detailed study and comparison of the laws of Theodosius II and Justinian. His conclusion, briefly, seems to be that the law of Theodosius II was penal but Justinian's was not. Suarez apparently reaches this conclusion from the fact

Suarez,[48] in discussing the opinions of earlier canonists regarding the nature of invalidating laws, clearly and definitely distinguishes invalidating laws which are penal in nature from laws which are in no sense penal. To take the latter first, Suarez says [49] laws which demand a certain form for an act are not penal. Neither are laws which prohibit an act with an invalidating clause because of the public good. To such laws for the public good, Suarez adds laws which are enacted for the conservation of the private good.[50] As examples, Suarez gives a contract of marriage between near relatives as antagonistic to the common good, and the restriction placed upon the religious profession of minors as antagonistic to the private good. These are good examples. Consanguineous marriage is a detriment to the public good, and only in some cases should it be permitted. On the other hand, the religious profession of minors would only indirectly affect the public good. It is primarily a protection for minors. The law intends that a well-considered judgment be had before one definitely and finally enters a religious community. The inexperience of youth is scarcely likely to produce such a judgment, and hence profession is forbidden to minors.

Further, Suarez [51] admits that invalidating laws can have a penal aspect. This occurs when the invalidity of an act is imposed because of crime. The example Suarez uses is the marriage between the adulterous. Such a marriage is invalid, and its invalidity is a punishment for crime.

Suarez [52] makes a further statement which is worthy of repetition. It is one thing, he says, to maintain invalidity is a penalty and quite another thing to say invalidity of an act is punished with a

that Justinian abstracted from the particular case for which Theodosius II enacted his law. Later, however, in the same chapter (n. 13), Suarez says "ostendimus irritationem introductam per legem non dubium, poenalem esse." This seems to be a contradiction of the general trend of his argument. But it is certain that Suarez taught that an invalidating law as such is not a penal law (Cf. lib. V, cap. XIX). Perhaps, in discussing Justinian's law, Suarez found it impossible to prescind from the initial words of this law which did concern fraud.

[48] *O. c.*, lib. V, cap. XIX.

[49] *Ibid.*, n. 5.

[50] *Ibid.*, n. 6.

[51] *Ibid.*, n. 8.

[52] *Ibid.*, n. 7.

penalty, or, in other words, to say that an invalid act is punished with a penalty. Conceivably, the legislator could punish invalid acts by imposing a penalty. The legislator can reasonably expect a compliance with his law, and anyone who disobeys this law is liable to punishment. If, then, a person deliberately produces an invalid act, he is subject to punishment. This is legitimate exercise of coactive power. The punishment would result from the infraction of the law. Obviously, a penalty of this kind is something superadded to the idea of an invalidating law.

According to Suarez, then, invalidating laws are not necessarily penal laws. He admits the possibility of simultaneous existence of invalidity and penalty, but these would be exceptional cases, and the two ideas are only materially joined. There is coalescence in fact but not in theory. Outside of these exceptional cases, when a penalty is imposed in an invalidating law, it is accidental and in no way affects the nature of such a law.

The doctrine of Suarez regarding the separation of the invalidity of an act and the imposition of a penalty is amply justified in the Decretals. To take examples on the alienation of the property of the Church: [53] In the fourth Council of Lyons it was determined that property of the Church could not be alienated. Infractions of this law fell under the force of an invalidating clause.[54] But in addition to the operation of the invalidating law, punishments were decreed. Pope Symmachus issued a similar law. This law imposed similar penalties.[55] Pope Paul II was equally concerned with the inviolability of the property of the Church, and to protect it against alienation he issued his decretal *"Ambitiosae"*.[56] This decretal forbade the alienation of the property of the Church without the consent of the Holy See. Further, it punished infractions of this law with severe penalties.[57]

[53] For the earlier law on the alienation of the property of the Church, cf. C. XII, q. 2.

[54] C. 2, X, *de rebus Ecclesiae alienandis vel non,* III, 13: "Irrita habeantur, quae obtinent."

[55] C. 6, X, *de rebus ecclesiae alienandis vel non,* III, 13.

[56] C. un., *de rebus ecclesiasticis non alienandis,* III, 4 in Extravag. com.

[57] "Si quis autem contra huius nostrae prohibitionis seriem de bonis et rebus eisdem quicquam alienare praesumpserit: alienatio, hypotheca, concessio, locatio, conductio et infeudatio huiusmodi, nullius omnino sint roboris vel momenti, et tam qui alienat, quam is qui alienatas res et bona praedicta

The doctrine of Suarez is equally clear and definite in determining the dual manner in which an invalidating law operates. From this determination, Suarez shows that the principal effect of an invalidating law is not to punish but to conserve the public good. It will be interesting to follow the statement of Suarez.

Suarez [58] says there are two ways in which an invalidating law operates. The first way is by directly ordering or commanding that an act be performed in a definite way and thereby forbidding other modes of action and invalidating them.[59] The general example given by Suarez is a law which demands that an act be performed in a definite way and which invalidates an act which does not comply with this law. The specific example given by Suarez is the law of the Council of Trent in regard to the form of marriage.

The second way in which an act is declared invalid is by prohibiting the act with a clause which clearly indicates invalidity.[60] Suarez gives various examples, e. g., marriage between near relatives, etc.

This second way of declaring an act invalid approaches the more modern and accepted concept of a law which declares a person incompetent to act legally. In fact, Suarez records this as a third way of declaring acts invalid. He attributes this to theologians. Suarez himself rejects this third way of declaring acts invalid not because it is untrue but because it is already contained in the dual manner which he has outlined. Hence, Suarez in no sense denies that legal incapacities attach to certain persons, e. g., clerics in sacred orders, but he thinks such incapacity is already seen when the act is forbidden.

The above outline of the doctrine of Suarez shows that there is no necessary connection between invalidating laws and penalties. Suarez determines the nature of invalidating laws by observing their operation. From the different ways in which these laws do operate

receperit, sententiam excommunicationis incurrat." For a commentary on this decretal of Paul II, cf. Cleary, *Canonical Limitations on the Alienation of Church Property,* n. 100, The Catholic University of America Canon Law Studies (Washington, 1936), pp. 49-53.

[58] *Ibid.,* n. 4.

[59] ". . . primo directe aliquid constituendo et praecipiendo, et solum per consecutionem, seu indirecte prohibendo et irritando."

[60] "Alius modus directe irritandi actum est negativus, seu prohibitus actus cum verbis sufficientibus ad irritandum illum."

no indication is given that a penalty is involved. Penalties can be added to the violation of these laws in the same way that there can be sanctions for the violation of any other law.

Sanchez considers briefly the possible penal nature of invalidating laws.[61] Sanchez's treatment of this question is in no way as exhaustive as that of Suarez. However, Sanchez commendably notes the weight of authority on the side of the onerous and not penal nature of invalidating laws. Sanchez's own opinion is that an invalidating law is not penal in nature but is an onerous law. But, before he discusses this opinion, Sanchez notes the possibility of founding the opposite opinion on a statement of St. Augustine.[62]

In his definition of a penalty, St. Augustine calls it an injury (*laesio*) which punishes an evil action.[63] Sanchez accepts this idea of a penalty, and he says in effect in so far as this is true, an invalidating law is penal. Thus, Sanchez, relying on his interpretation of St. Augustine's words, can be cited as maintaining that some invalidating laws are penal. This position agrees with the doctrine of Suarez.

However, it is doubtful whether the authority of St. Augustine can really be cited as supporting the penal nature of invalidating laws. St. Augustine is speaking of the theological concept of penance and, incidentally, defines a penalty. Yet, even this incidental definition is very closely united with the theological concept of penance. St. Augustine is not speaking of the juridical force of penalties, nor is he concerned whether a penalty can be attached to the infraction of a law. He says: "*Poenitere enim est poenam tenere, ut semper puniat in se ulciscendo quod commisit peccando.*" This citation introduces St. Augustine's definition of a penalty, and it must be considered as controlling his idea of a penalty. If this be true, all juridical force of St. Augustine's definition of a penalty is eliminated, for the penalty understood here is a self-inflicted punishment. Such punishments are clearly seen in theology and could be spoken of as penances, but they would scarcely be known in law. In law a penalty is inflicted by a superior either directly in the operation of the law or through the ministry of a judge. No self-inflicted punishments are contemplated in law.

[61] *Disputationum de Sancto Matrimonii Sacramento libri decem* (Venetiis, 1612), v. I, lib. II, disp. IV, nn. 8-10.

[62] C. 4, D. III, *de poenitentia.*

[63] "Poena proprie dicitur laesio, quae punit et vindicat quod quisque commisit."

Further, it should be noted that St. Augustine in the last sentence of the complete citation in the Decree of Gratian seems to think that penance and a penalty are the same thing.[64] These two items can be considered the same in theology, for a person does penance by punishing himself, but the relationship is entirely different in law. There a person suffers a penalty imposed by another. In accepting this penalty, a person will show his state of penitence and thereby be practising penance, but he cannot be said to be practising a penalty. All self-inflicted punishments are matters of theology, not matters of law. For these reasons, it is maintained that St. Augustine's definition of a penalty cannot be urged for the penal nature of invalidating laws.

As was mentioned earlier, Sanchez gives a long list of writers who support the non-penal nature of invalidating laws.[65] Some of these writers are also quoted in favor of the penal nature of invalidating laws by Suarez.[66] There may be some inconstancy in the works of these authors, but the correct explanation of their apparent indecision is probably found in the type of invalidating law then being considered. Decius, for instance, who is said by Suarez to maintain that invalidity resulting from law is a natural and intrinsic penalty, is also cited by Sanchez to support the non-penal nature of invalidating laws regarding the alienation of the property of the Church. Decius could well have held both opinions, for it is certain that some invalidating laws are penalties for crime, e. g., uxoricide, while other invalidating laws are clearly not the result of crime.

Sanchez, however, did see some inconstancy in the opinion of Decius, for while he cites him to support the non-penal nature of invalidating laws regarding the alienation of the property of the Church, he also cites him to maintain that an invalid act resulting from the lack of proper formalities is a penalty. Both opinions could not be held simultaneously. If, as mentioned in the preceding paragraph, Decius held that some invalidating laws are penal in nature and at the same time held that the laws on alienation are not penal, there would be no inconsistency in his opinions. But, if he held laws on alienation are not penal and yet the invalidity resulting from the non-compliance with these laws is a penalty, his

64 "*Ille igitur poenam tenet, qui semper punit quod commisisse dolet.*"

65 *Ibid.*, n. 9.

66 E. g., Decius, in Suarez, *ibid.*, n. 2.

opinions are inconsistent. Sanchez is correct in mentioning this inconsistency.

The opinions of Decius, however, are not similarly criticized by Suarez. Suarez does mention that Decius' doctrine is in favor of the penal nature of invalidating laws,[67] but later he cites Decius as the best author expressing the opinion that the idea of a penalty does not necessarily enter into the concept of invalidity resulting from the infraction of law.[68]

Conciliation of the views of Decius as stated by Sanchez and Suarez must remain doubtful. But the probable judgment on these views will be arrived at by maintaining that Decius saw invalidity as a penalty in certain laws but not in all invalidating laws. Admittedly, his position on the invalidity of an act resulting from the non-fulfillment of required formalities is difficult to explain. He may have considered deliberate neglect of these formalities as worthy of punishment and so formulated his opinion.

Reiffenstuel [69] in his treatise on the Rules of Law of Pope Boniface VIII does not even consider the possibility that invalidity and penalty may be identified. Reiffenstuel's doctrine is clearly set forth in regard to the necessity of observing certain forms and formalities. He cites the pertinent Decretals controlling the alienation of the property of the Church and controlling the making of testaments. Of legislation more closely united to his own time, Reiffenstuel proposes the example of the Tridentine form of marriage.

Had Reiffenstuel entertained any thought of the penal nature of an invalidating law, he could very properly have discussed this idea in his treatise on the Rules of Law. Rule 64 [70] establishes a rule of law that is a restatement of the Roman Law of Justinian who borrowed it from Theodosius.[71] This rule of law in course of time underwent milder interpretation, but in its source at least it had a rigid application. But nowhere in his discussion of Rule 64 does Reiffenstuel consider the penal nature of an invalidating law, although he knew that Theodosius had originally enacted his law in penalty of a crime.

[67] *Ibid.*, n. 2.

[68] *Ibid.*, n. 4.

[69] *Ius Canonicum Universum complectens Tractatum de Regulis Iuris* (Parisiis, 1870), reg. 64.

[70] "Quae contra ius fiunt, debent utique pro infectis haberi."

[71] *Codex Justinianus* (Berolini, 1929), I, 14, 5.

Nor, in his treatise on the existence, obligation and effect of an invalidating law does Reiffenstuel even consider its possible penal nature.[72] Valuable commentary is found in this treatise which will more properly be considered in a later article when the obligation and interpretation of an invalidating law are discussed. Yet, here too, Reiffenstuel could have expressed his opinion regarding the possible penal nature of an invalidating law. But all he says is that power to establish an invalidating law is necessary for the good of the community. He does mention that an invalidating law is an aid to obviate the misdeeds of the malicious, but always the principal idea is the advantage of good government.[73]

Another opportunity which Reiffenstuel might have used to discuss the possible penal nature of an invalidating law is found in his treatise on the alienation of the property of the Church. Reiffenstuel discusses at length the concept and origin of alienation; he discusses the solemnities involved and the invalidity of contrary acts; he also mentions the penalties for disobeying the law.[74] But Reiffenstuel does not discuss the nature of the laws on alienation.

The doctrine, then, of Reiffenstuel, even though he does not specifically consider the point, must be quoted against the opinion of those who maintain the penal nature of invalidating laws. Both from the reason which he offers for the enactment of invalidating laws and from the examples he uses to expound these laws, Reiffenstuel's opinion can be deduced. Invalidating laws according to Reiffenstuel are not penal. They are laws for the common good of the community.

The argument for the non-penal nature of invalidating laws is based on the necessity for the existence of a crime before a penalty can be imposed. This is nothing new in the development of law, for the proper and actual infliction of a penalty is inconceivable without previous crime. There is no reason for denying that, occasionally, punishments are inflicted unjustly and without previous

[72] *O. c.*, lib. I, tit. II, *de constitutionibus*, § XI.

[73] After establishing the necessity of an invalidating law, Reiffenstuel says: "Accedit ratio, quia potestas aeque necessaria est in legislatoribus ad bonum gubernium reipublicae, sicut potestas quidpiam prohibendi, subditosque obligandi: ut sic impiis malitiosorum machinationibus eo potentius cassatisque ipsorum perniciosis actibus proborum indemnitas, et tranquillus reipublicae status conservari valeat."—*Ibid.*, n. 239.

[74] *O. c.*, lib. III, tit. XIII, *de rebus Ecclesiae alienandis vel non.*

crime, but such punishments are inflicted through error or malice and are not part of the normal administration of either the Church or the State. Penalties are vindications of the right of a society to protect itself and the interests of its members. Penalties are useful means which are adopted to enforce the regulations controlling the welfare of a society. Without sanctions, it is difficult to enforce law since some members of society are lax in their cooperative effort toward the common good, while others are positively harmful to the State or the Church. Hence, to protect and advance the common welfare both the civil and the ecclesiastical authorities use penalties.

A penalty, then, is something usually added to a law. Of itself a law will bind the citizens, but penalty for the infraction of the law frequently aids its observance. The real concept of a penalty must, then, be clearly distinguished from the law it sanctions. It is not the hardship which results from an invalid act that constitutes a penalty. Such hardship is the self-inflicted inconvenience arising from the non-compliance with the law. A penalty is more than this. It presupposes bad will and a reluctance to obey the law, which reluctance the legislator considers sufficient for the exercise of his coactive powers. In the latter case, the bond of cooperation which the society needs is freely and deliberately broken. This violence must be punished for its own repression as well as to stigmatize such lack of cooperation as antisocial. The members of a society freely accept their responsibilities in society, and they can be reasonably expected to discharge their duties. Whenever there is a refusal to obey a law, the society is threatened, and to protect itself it must try to change refusal to obey a law into actual obedience to law. Penalties are the means to accomplish this end.

With this idea of a penalty in mind, it is evident that an invalidating law can be a penalty. But it is equally evident that an invalidating law need not be a penalty. In so far as invalidity of an act is a penalty, it can be justified by the same fundamental reasons which support the application of any other penalty. Thus, if the Church forbids marriage to uxoricides,[75] it does so because the crime itself deserves punishment, and the best means to punish those guilty of this crime will be to deny validity to their subsequent mutual marriage. Yet, it is not the repression and punishment of actual crime which constitute the duty of the government of a society. The authority of any society has far more duties than exercising

[75] Cf. c. 1075, § 3.

coactive power. There is common decency to observe; particular states of life to surround with protection; and the ever present duty to obviate any fraud which might injure the welfare of the society or its members. These duties are important and demand the utmost consideration. To discharge these duties, the legislator will enact invalidating laws whereby an act will not be recognized as legitimate, or whereby persons will not be recognized as able to act legally. In none of these instances would any actual crime be involved. There is, of course, the fear of the loss of decency, the need of protection and the fear of fraud, all of which will influence the legislator in enacting invalidating laws.

But the point insisted upon is that no actual crime is committed. Therefore, an invalidating law has no necessary connection with actual crime.

Besides the doctrine of Suarez [76] and Sanchez [77] other canonists can be cited who clearly taught that an invalidating law is directive and not necessarily penal. Some of these authors will be examined. Their doctrine constitutes the common opinion today. Together with the examination of this doctrine it will be interesting to see what was the judgment of some authors who merely indicated their opinion without expressly formulating reasons for this opinion.

Gibalinus [78] considers invalidating laws as restrictive laws.[79] Gibalinus does not directly discuss the nature of invalidating laws, but he does consider penal laws as a different species of law. Both invalidating laws and penal laws are considered as laws subject to restrictive interpretation. Both species of law are included in the category of odious laws (*odiosae leges*).

Peckius [80] is more explicit in his explanation of invalidating laws. His discussion of these laws is found in his commentary on the Rules of Pope Boniface VIII. His discussion is centered more on the validity of an act contrary to the law than on the nature of invalidating law. But in his explanation of the 64th rule of Pope Boniface VIII, Peckius says the penalty of nullity is not properly speaking a penalty because it does not cause the loss of any patrimony or

[76] *O. c.*, cap. XIX.

[77] *O. c.*, v. I, lib. II, disp. IV.

[78] *Scientia Canonica et Hieropolitana* (Lugduni, 1670), lib. IV, cap. VIII, n. 9.

[79] *Factum irritans—lex odiosa.*

[80] *De Regulis Iuris* (Antverpiae, 1666), reg. 64, n. 5.

the loss of any acquired rights.[81] In this way, Peckius excludes the concept of a penalty as one of the necessary elements of an invalidating law.

Altimarus [82] speaks of invalidity as resulting from the infraction of law. His statement is based on the law of Justinian.[83] While Altimarus may be cited as supporting the non-penal nature of invalidating laws, his statement must be considered with his idea of the purpose of laws which actually invalidate acts. According to Altimarus, the purpose of such laws is to penalize the transgressor.[84] Hence, while in one place Altimarus leans toward the onerous but not penal nature of invalidating laws, his doctrine is not entirely clear.

Covarruvias [85] likewise leans toward the non-penal nature of invalidating laws. His opinion is deduced from the various examples he discusses. Most of these examples consider testaments and codicils. In a testament or a codicil several formalities must be fulfilled, and if these formalities are neglected the instrument is invalid. Other formalities which may constitute further protection for the testator are not necessary for validity if the law does not require them.[86]

There is a statement, however, in the work of Covarruvias in which he clearly states the inefficacy of the testator's wishes if they are not made according to law. Covarruvias is speaking of civil law, but the principle is equally applicable to Canon Law. Covarruvias says: "*per leges civiles non potest quis sine solemnitate iuris testari, cum ab eo potentia auferatur. Colligitur ergo parum eius voluntatem prodesse, quantumcumque ea manifesta sit.*" [87] The statement of Covarruvias definitely places laws at least which demand formalities as laws which are not penal. The testator enjoys

[81] "Poena nullitatis non est proprie poena cum non sit diminutio patrimonii vel iuris quaesiti."

[82] *Tractatus de nullitatibus* (Neapoli, 1678), rubrica I, q. I, n. 15.

[83] ". . . *nullitas est: vitium, seu defectus rei gestae, proveniens ob legis transgressionem.*"

[84] "*In odium et poenam transgressorum*"—*ibid.*, q. 2, n. 8.

[85] *Opera Omnia: De Testamentis* (Coloniae Allobrogum, 1679), prima rubrica, n. 14.

[86] *De Testamentis*, cap. IX, n. 4.

[87] *De Testamentis*, cap. X, n. 13.

no power to make his testament except as the law provides. There is no punishment involved. All that happens is that the illegal testament is not recognized as valid.

Leurenius' opinion [88] is as definite as the doctrine of Suarez and Sanchez. Leurenius says invalidity is an apt penalty for crime, e. g., uxoricide, adultery, simony, but that invalidity must not be considered penal, for in some cases it is really a favorable item. This latter statement is better constructed than the opinions of Suarez and Sanchez.[89] Leurenius recognized that some hardship might result from the application of invalidating laws, but he considered such hardship as incidental and in no way destroying the favorable aspect of invalidating laws. Leurenius realized that the public good is the first duty of government, and for its protection and advancement invalidating laws may be necessary. His argument, therefore, is founded on the just rule of society where some sacrifice of rights could legitimately be demanded. Such sacrifice is not penal. Such sacrifice may be onerous at times to the members of a society, but the law which demands sacrifice of rights is favorable to the society. This aspect is reflected in the protection granted to the members of the society.

Wernz [90] considers invalidating laws in his discussion of the effects of law. Wernz definitely states that an invalidating law is not essentially penal. Probably, Wernz did not feel that much explanation should be made to prove this point, for instead he discourses rather at length on the effects of an invalidating law. There is much to learn from Wernz's discussion on these effects, but this matter can best be studied in the interpretation of invalidating laws. Here, it will be sufficient to note that Wernz considers a penal invalidating law as inoperative if the crime which it intends to punish is in fact non-existent. Wernz is not so certain that ignorance of the penalty alone of invalidity will prevent the operation of the law.

Wernz, in admitting the existence of penal invalidating laws, cites the Decretals of Pope Gregory IX.[91] These decretals were laws

[88] *Ius Canonicum Universum* (Venetiis, 1729), lib. I, tit. II, q. 132.

[89] "Sunt enim tales leges potius favorabiles, non obstante quod aliquando per eas graventur contrahentes, lege non intendente hoc gravemen per se, sed solum bonum publicum et rectam reipublicae administrationem, ob quam aliqua onera Respublica imponere potest civibus."

[90] *Ius Decretalium* (Prati, 1913), tom. I, pp. 132-134.

[91] X, *de eo, qui duxit in matrimonium quam polluit per adulterium*, IV, 7.

punishing the crimes of uxoricide and adultery. Wernz further cites as support for the existence of penal invalidating laws the decretal of Pope Boniface VIII,[92] which invalidated an election of a religious who had consented to his election without the permission of his superior. This decretal was examined in detail earlier in this article and found to be poor support for the penal nature of invalidating laws. If this examination is correct, it can scarcely be cited for the actual existence of penal invalidating laws because it is rather an insistence on the observance of a formality which had been neglected that led Pope Boniface VIII to issue his decretal. De Angelis[93] clearly differentiates penal laws from prohibitory laws. A subdivision of the latter includes invalidating laws. Such division and subdivision are enough to learn De Angelis' opinion regardng the nature of invalidating laws.

There is, however, in De Angelis' commentary on the Decretals a discussion of the retroactivity of laws where the subject of invalidating laws is twice considered.[94] De Angelis says first an act completed in the past cannot be matter for a prescriptive law or for a law which merely prohibits an act; but such an act can be matter for an invalidating law. De Angelis arrives at this conclusion from a comparison with the effect of a law which permits a judge to invalidate an act. This comparison is not strictly conclusive for the invalidity pronounced in court is not necessarily operative before the sentence is issued. If all laws which eventually result in the invalidity of acts were equally onerous, De Angelis' conclusion could be readily adopted. But, the basis for the conclusion of De Angelis that invalidating laws are not necessarily penal in nature can, if understood properly, be used. Certainly, as De Angelis says, if the sentence of a judge can invalidate an act performed in the past, a law subsequent to the act can produce the same effect.

Later[95] De Angelis discusses the legal incompetence constituted by a law. De Angelis says that such legal incompetence to act can be retroactive, whereas no penalty can be proposed and inflicted for past acts. This is a clear indication that, according to De Angelis, legal incompetency to act is not necessarily a penalty. In fact, De

[92] C. 27, *de electione et electi potestate*, I, 6 in VI°.

[93] *O. c.*, lib. I, tit. II, p. 42.

[94] *O. c.*, lib. I, tit. II, p. 45.

[95] *L. c.*

Angelis states definitely that legal incompetence to act is not strictly speaking a penalty.[96] The reason assigned for this statement is that legal incompetence to act does not deprive one of rights already acquired. Moreover, such incompetence to act is necessary for the common good.

It will be remembered, of course, that De Angelis is speaking directly of the retroactivity of laws. Only indirectly, is he discussing the nature of invalidating laws. Yet, from the standpoint of possible retroactivity, De Angelis shows clearly that an invalidating law is not necessarily of penal nature. His example of legal incompetence to act is an excellent example. If any criticism can be made of this example to show that an invalidating law is not necessarily penal it would lie in the fact that such incompetence is particularized by some authors,[97] and assigned as a penalty for crime. Such criticism, however, should not be pressed too far as no one denies that invalidity of an act can be a penalty. The only question is whether it is necessarily so. De Angelis can be cited as maintaining the non-penal nature of invalidating laws.

In concluding this article on the concept of invalidating laws, it is necessary to indicate that certain laws resemble invalidating laws in producing the same ultimate effect. These laws restore the original status of persons who have petitioned a judge for a rescissory judgment.[98] These laws must be carefully distinguished from invalidating laws. Normally, these laws presuppose a valid act and operate either on plea of a petitioner or officially by the personal intervention of the judge himself.[99] While a discussion of these laws would be profitable and could again set forth the nature of laws which actually invalidate acts, such discussion, because of its length, would be beyond the scope of the matter at hand.

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96 "Inhabilitatio proprie dicta poena non est."

97 E. g., Suarez, *o. c.*, lib. V, cap. XIX, n. 8.

98 Cf. cc. 1684-1689; 1904-1907.

99 Cf. c. 1688.

THE PHILOSOPHY OF LEGITIMACY

I. Meaning of Legitimacy

THERE are many concepts in the field of jurisprudence on whose meaning scholars can not entirely agree. Yet here, as in other fields of science, it is the philosophical principle that constitutes the basis of a doctrine. A clear understanding of the former is therefore fundamental.

Among the disputed concepts there is one which scholars not only do not often discuss but sometimes try to avoid or deny: the concept of legitimacy.

What is legitimacy? The definition may properly begin not in philosophy but in a less difficult field, etymology. The Latin equivalent in its adjective form is " legitimus ". The fundamental meaning of " legitimus " is " juri conveniens " [1] and is synonymous with " iustus ", " verus ", " aequus ": [2] " Hinc legitimum est, aequum, iustum est ".[3] " Legitimus " or " legitime " is the characteristic of perfect rightfulness, the negation of any deficiency and the complete conformity with law.[4] " Legitimus ", therefore, comprises also the concept of legality. Thus in Roman Law it includes the notion of harmony with law, especially with the norms of Civil Law, or accord with a *lex*; and connotes that which is legal or rightful.[5] Nevertheless the basic meaning of " legalis " is a more active one: " ad leges pertinens ".[6] But " legitimus " becomes very similar to " legalis " in Roman Law. However it never loses its very particular character of solemnity, earnestness, purity, truth. This is one of the reasons why the language of the Roman Law uses the expression " legitimus " to stress the value and efficacy of law and

[1] H. Ed. Dirksen, *Manuale Latinitatis Fontium Juris Civilis Romanorum* (1837).

[2] Forcellini-De-Vit, *Totius Latinitatis Lexicon III* (1865).

[3] Forcellini, *loc. cit.*

[4] Forcellini (*loc. cit.*): " Saepe enim est plenus, perfectus, iustus, *cui nihil deest.*"

[5] Heumann-Seckel, *Handlexicon zu den Quellen d. röm. Rechts*, 9. Aufl., Neudruck (1926); Myer-Lübke, *Romanisch-Etymologisches Wörterbuch* (3, 1935), 4971.

[6] Forcellini, *loc. cit.*

of actions based upon such a norm in relation to non-Roman law, to " ius gentium " and " ius naturale ".[7]

" Legitimus " defines certain actions as " actus legitimi ", an idea which was adopted by Canon Law and continues to be of great importance.[8] The Latin language of the medieval jurisprudence has the tendency to equalize " legitimus " and " legalis ".[9] However the original meaning is also still in use. Thus " legitimare " or " legitimatio " [10] means the purification of an incorrect or even illegal act and the restoration of a legal order hallowed by " legitimacy ". "Legitimation" has the character of reconciliation and purification.[11] In the terms of American jurisprudence, " legitimate " means: [12] " that which is according to law; as legitimate children are lawful children, born in wedlock, in contradistinction to bastards; legitimate authority, or lawful power, in opposition to usurpation ". The meaning of the French " légitimité " [13] in its basic definition is very similar to the Latin concept: " la qualité de ce qui est conforme à la justice, à la raison, ou aux règles établies . . . ". It means also the legal quality of children born in wedlock. It has a third much more restricted significance: " En termes de Politique, il se dit du droit des princes qu'on appelle légitime.[14]

[7] About the difference of the concept of Natural Law in Roman Law and Scholasticism see: E. E. Hölscher, *Die Umgestaltung d. röm. Rechts, Individual-Justitia* (1932).

[8] N. Hilling, " Die fehlerhaften Rechtshandlungen und ihre Heilung "—*Archiv für katholisches Kirchenrecht* (*AKKR*), CVII (1927), 11; Ed. Eichmann, " Actus legitimi "—*AKKR,* CXVI (1936), 43 sqq.

[9] Du Cange, *Glossarium Mediae et Infimae Latinitatis,* V (1885).

[10] Du Cange, *loc. cit.*

[11] E. g., legitimatio per subsequens matrimonium. Cf. Gilbert J. McDevitt, *Legitimacy and Legitimation,* n. 138, The Catholic University of America Canon Law Studies (Washington, D. C.: The Catholic University Press, 1941), pp. 5 sqq., 46 sqq., 124 sqq.

[12] Walter A. Shumaker, George Foster Longsdorf, James C. Cahill, *The Cyclopedic Law Dictionary* (2. ed., 1922), p. 598.

[13] *Dictionaire de l'Académie Française,* 7. ed., vol. II (1878).

[14] It is interesting to add that the term " légitimiste " was approved by the French Academy only in 1878, meaning " partisan de la légitimité ", although it had already been accepted in both French and English usage "—*The Encyclopedia Americana,* vol. XVII (1942), p. 220.

Canon Law has three groups of terms referring to " legitimus ", as Rudolf Koestler points out in his outstanding dictionary.[15] First of all, it means that which is according to *lex, ius*, or *norma*. Then it means " natural ". The third meaning is in relation to *ius matrimoniale*, as for example, born in wedlock. These three groups of meanings form a logical system. They originate, of course, from the Roman legal concept, but do not include its later modifications. It becomes even easier to clarify these terms by referring to a related meaning, " legalis ". According to Koestler " legalis " is nearly reduced to its original concept in the language of the Code, that is, " legal ", that which is according to a bill (of a State).[16] " Legitimus " regains in Canon Law the principal meaning of " according to law ", or even wider, " according to norms ".[17] At the same time, the notion of " legitimus " includes also in Canon Law the idea of truth, purity and perhaps, solemnity. Evidently it includes also rationability.[18] Legitimacy also supposes competency. Thus legitimacy is the basic expression of the Natural Order. It is, therefore, apparent why Canon Law retains the term " *matrimonium legitimum* " for the natural law marriage of non-Christians.[19]

As far as this discussion is concerned, it is held that " legitimus "[20] in its basic meaning expresses the natural, true and necessary accord with an order of norms. It is not only an accord with any actual law whatsoever, but an accord with the Divine and natural order. It is not only " lawfulness " that is required, but " rightfulness ".[21]

[15] R. Koestler, *Wörterbuch zum Codex Iuris Canonici* (1907), p. 209; cf. K. Mörsdorf, *Die Rechtssprache des Codex Iuris Canonici*, H. 74 der Veröffentlichungen der Görres-Ges. (1937).

[16] E. g., " cognatio legalis " (c. 1080); " lucrum legale " (c. 1543); " tempus legale " (c. 33, § 1).

[17] Canon law knows, besides legal norms, also the prescripts of dogma and morals; cf. W. Plöchl, " Das Legitimitätsproblem und das kanonische Recht " —*Zeitschrift fur Öffentliches Recht* (*ZOR*), XVIII (1938), 49 seq.

[18] Michiels (*Normae Generales Iuris Canonici*, 1929, I, 5): " legitima facultas "—" rationabilitas ".

[19] Koestler translates: " natürlich ".

[20] Cf. a short survey in J. Held, *Staat und Gesellschaft*, 3 Bde. (1861-1865), II, 687 seq.; cf. also J. Held, *Über Legitimität, Legitimitätsprinzip*, (Universitätsprogramm) (1859), 5 seq. (other definitions); and S. Brie, *Die Legitimation einer usurpierten Staatsgewalt*, I (1866), 3 (here is found also earlier literature).

[21] See the very interesting observation of Herbert Wright, *The Moral Bases of International Law* (reprinted from the Proceedings of the Thirty-fifth

The term has acquired sometimes a more formalistic sense, which superimposed on it, deprived it of its original meaning or even imparted to it a meaning directly opposite. Not to be excluded from the original notion as conceived by Latin etymology is the concept " aequitas ".[22] We shall see that the principle of legitimacy in its modern concept must comprise this idea, too. Nothing can be more harmful to the true doctrine of legitimacy than formalistic restrictions or reductions, if only to the idea of legality (lawfulness). Legitimacy and legality may match, but this is not always essential.[23] At any rate these terms have a different meaning.[24] The philosophy of legitimacy needs as its essential basis the recognition of God as the only and eternal source of justice and law. The modern legal positivism,[25] therefore, is unable to penetrate the innermost principles of legitimacy.

II. The Principle of Legitimacy and Political Science

Works on political science and political history commonly hold as to the origin of the principle of legitimacy [26] that Talleyrand [27]

Annual Meeting of the American Society of International Law, Washington, D. C., 1941), p. 60. It reads: " The recognition of the moral duty which exists to obey international law is perhaps easier for the French, Italian, Spanish and Germans to understand than for the English-speaking peoples, because the words droit, diritto, derecho, Recht connote the moral element which is wanting in the English word " law ". Though " law " prevents confusion between law and morality, it does not suggest the important truth of the moral duty to obey the law."

[22] Cf. Forcellini, *loc. cit.*

[23] E. g., " tutela legitima "; cf. A. Baumgarten, *Notstand und Notwehr* (1911).

[24] E. Albrecht, *Das Recht der Revolution* (1934), p. 41.

[25] As to the definition of the notion, " legal positivism ", see A. Merkl, " Die Staatsbürgerpflichten nach kath. Staatsauffassung "—*ZOR*, XVII (1937), 1 seq.

[26] Schmid, *Lehrbuch des gemeinen deutschen Staatsrechts*, I (1821); Kalkreuth, *Über Legitimität* (1823); Pölitz, *Die Staatswissenschaften im Lichte unserer Zeit*, I (2. ed., 1827), 459; K. Hermanni, *Über das Prinzip der Legitimität* (1831); F. Murhard, *Die Volkssouveränität in Gegensatz zur sogenannten Legitimität* (1831); Hegel, *Grundlinien der Philosophie des Rechts* (1833), p. 373; J. L. Klüber, *Öffentliches Recht des Teutschen Bundes und der Bundesstaaten* (4. ed., 1840), pp. 108 seq.; R. Maurenbrecher, *Grundsätze des heutigen deutschen Staatsrechts* (1843), p. 56.

[27] Cf. surveys in: " Legitimität " (S. Hirt)—*Staatslexikon d. Görresges.*, III (5. ed., 1929); " Legitimität " (Welcker)—*Staatslexikon* von Carl v. Rotteck

was the first to introduce it into the language of diplomacy.[28] There is no doubt that Talleyrand used the doctrine for the accomplishment of his political aims. It is also true that it was the dominating doctrine in the Congress of Vienna (1815). But in those hands the principle of legitimacy was very much restricted and reduced rather to a political argument than conceived as a principle of law. The Congress of Vienna and the efforts of the following years aimed at a restoration of the European order, disrupted by the French Revolution and the Napoleonic wars. The use of the principle was intended as a means to restore the expelled princes or their legitimate heirs to their respective thrones and to eliminate

und Carl Welcker, VIII (2. ed., 1847); "Legitimitätsprinzip"—*Handwörterbuch der Rechtswissenschaft* von Fritz Stier-Somló, III (1928), 933, 934; "Legitimitätsprinzip" (P. Herre)—*Politisches Wörterbuch* von K. Jagow-P. Herre, II (1923), 34, 35; "Legitim"—*Staatslexikon* von K. Baumbach (1882), pp. 338, 339; "Legitimität"—*Staatswörterbuch* von Bluntschli-Brater, VI (1857-1870), 336; "Legitimacy"—*The Encyclopedia Americana*, XVII (1942), 218, 219.

[28] Wilhelm Schwarz, *Die Hl. Allianz* (1935), p. 366. The doctrine is found in Talleyrand's *Instruction d'Angeberg*, I, 250 seq.; in a letter to Metternich of December 19, 1814—*ibid.*, p. 540 (see Kühler, *Acten d. Wiener Congresses*, 1817, VII, 48 seq.); and in Talleyrand's report to Louis XVIII of December 20, 1814, and in his final report—N. Pallain, *Correspondence inédite* (1881). But it is very doubtful whether Talleyrand was really the first to use the word "legitimacy". Pallain terms Talleyrand's tenets of legitimacy rather well an "expédient suprême". It has been proved that Pozzo di Borgo and Castlereagh used this expression. But it was also well known to Metternich and Gentz—H. O. Meisner, *Lehre vom monarchistischen Prinzip* (1923), pp. 115 seq.; H. v. Srbik, *Metternich*, I (1925), pp. 363 seq. For the political history of legitimacy cf. further: A. Stern, *Geschichte Europas seit dem Vertrag von 1815 bis zum Frankfurter Frieden 1871*, 10 vol. (2. ed., 1913-1921); A. de Stieglitz, *De l'équilibre politique, du légitimisme et du principe des nationalités*, 3 vol. (1893-1897); Paul Herre, *Völkergemeinschaftsidee und Interessenpolitik in den letzten Jahrhunderten* (1920); H. v. Srbik, *Deutsche Einheit*, I, II (1935); M. de Roux, *La Restauration* (1930), pp. 109 seq.; G. Ferrero, *Réconstruction, Talleyrand à Vienne 1814-1815* (1939), pp. 47 seq. and pp. 208 seq. Legitimacy became the topic of discussion in various countries: v. g., the question of the succession of Dom Pedro I of Brazil and of Infante Dom Miguel to the throne of Portugal, both of which occasioned a flow of literature as found in the following studies, to mention only a few: *Legitimidade* da feliz regeneração politica de Portugal . . . (1826—favoring Dom Pedro); *Riposta* de hum amigo a outro . . . (1829—against Dom Pedro); Comte de Bordigne, *Légitimité Portugaise* (1830—in favor of Dom Miguel. Another very interesting study is the pamphlet of Joachim Lelewel, *La légitimité de la Nation Polonaise* (1837).

all the newly set up states and dynasties. Only the old dynasties and their legitimate heirs were to be recognized and protected.[29] It would go beyond the limits of this article to deal with these political aims of the principle of legitimacy.[30] To establish them was one of the purposes of the Holy Alliance.[31]

The more the doctrine of legitimacy was invoked as offering defense for the legitimacy of various regimes established by revolution or to justify the legitimacy of the annexation of certain provinces, the greater became the divergence between the philosophical principle and politics. But a similar divergence took place also within the sphere of the philosophy of law. It must not be overlooked that it was an aim of politics to use the slogan of legitimacy for the realization of certain purposes. But there were also opinions advocating the extension of the concept beyond the so-called dynastic legitimacy [32] so as to abolish constitutional limitations and refuse recognition to those adopted by the Congress of Vienna. Carl von Rotteck denied the rightfulness of any such restrictions.[33] He deduces a general concept of the philosophical idea of legitimacy somewhat different from that held by the writer: " Legitimität oder Gesetzmässigkeit ist nichts anderes als überhaupt die durch ein Gesetz statuierte oder anerkannte Rechtmässigkeit oder Rechtsgültigkeit." He equalizes legitimacy and legality, restricts his idea to the political concept, and acknowledges the even narrower concept based on a dynastic regime, the " Fürstenlegitimität ", an idea that entered the political sphere, " as some kind of a Shibboleth ", only after the period of Talleyrand's sponsorship.

[29] Friedrich Brockhaus (*Das Legitimitätsprinzip,* 1868, p. 22): " Das letzte und höchste Ziel der Legitimitätstheorie war somit eine völkerrechtliche Garantie aller in Europa bestehenden Dynastien und Staaten, übernommen von allen oder doch den hauptsächlichsten Mächten des Weltteils. Die Legitimität sollte die Basis einer *von* Europa *für* Europa übernommenen Friedensbürgschaft sein."

[30] Brockhaus, *op. cit.,* p. 33.

[31] F. X. Kiefl, *Die Staatsphilosophie der kath. Kirche und die Frage der Legitimität in der Erbmonarchie* (1928), p. 16 seq.

[32] " Fürstenlegitimität ".

[33] " Legitimität "—*Staatslexikon* von Carl v. Rotteck und Carl Welcker (2. ed., 1847).

In recent years, Stier-Somló has seen in the principle of legitimacy a legal principle well known since the earliest medieval centuries, although restricted to the sphere of constitutional law.[34] He admits that it became a constitutional and political slogan only at the time of the Congress of Vienna. But he points out positively that the impulse towards this principle is much older in history. He selects five periods.

1. The early Middle Ages to the beginning of the antagonism between the emperor and the papacy.[35]

2. The following period to the end of the Middle Ages.[36]

3. The era of the Reformation. He holds that in this period the idea of legitimacy was closely linked with the problem of the right of resistance.[37] According to his view, the decisive step was taken in Luther's doctrine based on the violation of duties by the emperor. Calvin conceded the right of resistance to the provincial diets.

[34] Stier-Somló, *Staatswörterbuch,* III, pp. 933, 934; *idem., Reichs- und Landesstaatsrecht,* I (1924), pp. 213 seq.

[35] O. Schilling, *Naturrecht und Staat nach der Lehre der alten Kirche* (1914); K. Voigt, *Staat und Kirche von Konstantin d. Gr. bis zum Ende der Karolingerzeit* (1936), cf. also L. Gaugusch, "Staatslehre des Apostels Paulus" —*Theologie und Glaube* (1934), pp. 529 seq.

[36] O. Schilling, *Staats- und Sociallehre des hl. Thomas v. Aquin* (1923); K. H. Ganahl, *Studien zur Geschichte des Kirchl. Verfassungsrechts in 10. und 11. Jahrhundert* (1935); M. Grabmann, *Mittelalterliches Geistesleben,* I, II (1926-1936); A. Michel, *Papstwahl und Königsrecht* (1936), (cf. also for additional bibliography); F. X. Arnold, *Die Staatslehre d. Kardinal Bellarmin* (1934); J. A. Rager, *Political Philosophy of Blessed Cardinal Bellarmine* (1926).

[37] See Fritz Kern, "Luther und das Widerstandsrecht"—*Zeitschrift d. Savigny-Stiftung,* kan. Abt. VI (1916), 331 seq.; Fritz Kern, *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter* (1915); H. W. Beyer, *Luther und das Recht* (1935); E. Albrecht, *Das Recht der Revolution* (1934), (with bibliography), p. 79 seq.; H. H. Borcherdt, *Luthers Anschauungen vom Wesen der Obrigkeit,* Einleitung zu M. Luthers Ausgewählten Werken, IV (1923), p. XV; Johannes Althusius (3. ed., 1913), p. 307; K. Wolzendorf, *Staatsrecht und Naturrecht* (1916); F. X. Arnold, *Die Staatslehre d. Kardinal Bellarmin* (1934), pp. 24 seq.; F. X. Arnold, *Zur Frage des Naturrechts bei Martin Luther* (1937); J. Bohatec, *Calvin und das Recht* (1934); A. Grobmann, *Das Naturrecht bei Luther und Calvin,* Phil. Diss. Hamburg (1935); J. Heckel, "Recht und Gesetz, Kirche und Obrigkeit in Luthers Lehre vor dem Thesenanschlag"—*Zeitschrift d. Savigny-Stiftung,* kan. Abt. (1937), pp. 295 seq.; A. Beck, "Natural Law and the Reformation"—*The Clergy Review,* XXI (1941), 73-81.

These tenets reached their climax in the theories of Johannes Althusius, Hobbes, Poynet and eventually Rousseau.[38]

4. The era of the doctrine of sovereignty, the first third of the nineteenth century. The author holds that the doctrine is based upon much older systems and that it can be traced back as far as Bodinus and Grotius.[39]

5. The more recent period in which legitimacy has ceased to be a characteristic of the executive power.

So far the findings of Stier-Somló.

Another system has been worked out by the French scholar, Raymond Gaudu.[40] His work is by far the most authentic among those of French students in this field. He excels especially when he deals with his special province, the development of the various doctrines of French scholars. An interesting phase of his treatment also is his description of the problem of legitimacy in French political history, beginning with the Revolution and continuing through the nineteenth century to the establishment of the Third Republic.[41] The first part of his work is dedicated to a description of many doctrines dealing with the problem of legitimacy or touching it in various correlations.[42] The French scholars noticed far outnumber those of other nationalities. Among them he lists E. de la Boëtie, F. Hotman, Languet, Loyseau, Bossuet, Fénelon, Jurien, Burlamagni, Vattel, Rousseau, Mably, Siéyès, Condorcet, B. Constant, Cousin, de Bonald, de Maistre, Ballanche, Royer, Collard, Guizot, Thiers, LaMennais, Louis Blanc, Jules Simon, J. Favre, Renan, Espinas, Renouvier, Fouillée, Andler, Saint-Simon, Auguste Comte, Proudhon, Taine, Courcelle, Seneuil, de Vareille, Sommières, Duguit. But Gaudu does not fail to take into greater account the findings of English scholars,[43] or to refer to the teachings of

[38] For bibliography see R. Gaudu, *Essai sur la légitimité des gouvernements dans ses rapports avec les gouvernements de fait* (1914); E. Albrecht, *op. cit.*; F. X. Arnold, *op. cit.*

[39] As to the development of these theories, see E. K. Winter, "Der paternale Staat"—*ZOR*, X (1931), 226 seq.; *idem*, *Sozialmetaphysik der Scholastik* (1929), pp. 55 seq. The tenets of James I belong to this doctrine—cf. F. X. Arnold, *ibid.* (with bibliography), pp. 138 seq.

[40] *Loc. cit.*

[41] *Op. cit.* (pp. 347-700); Les Faites depuis 1789 en France.

[42] *Op. cit.* (pp. 19-346); Les doctrines.

[43] Especially St. Thomas More, Cardinal Bellarmine, Hobbes, Locke, Bentham, John Stuart Mill, and Spencer.

St. Thomas Aquinas and the Catholic and Protestant scholars of the sixteenth and seventeenth centuries.[44] He discusses, too, the ideas of the Popes of the nineteenth century, though he rather neglects the leading German theorists,[45] mentioning none of the last century. In the third and last part of his work, he classifies all the doctrines which he outlined earlier, placing them in three groups: doctrines which recognize the inalienable sovereignty of the people, doctrines which declare this sovereignty alienable, and doctrines which combine " differents éléments formateurs de la légitimité ".[46]

But neither Stier-Somló nor Gaudu meet, in our opinion, all the requirements of systematic studies of the history and the criticism of the doctrine of legitimacy. However, we must attribute due merit to both their expositions, for they widened broadly the points of view of our problem. Legitimacy is not only a juridical but also—and this to a very high degree — a philosophical problem. Doctrines of legitimacy are, therefore, closely linked with the development of philosophical ideologies. So long as justice and rightfulness have a place in philosophy, the problem of legitimacy can not be solved without reference to them. Here science still has a very neglected field calling for intense study. Modern criticism of the idea of legitimacy is based mostly upon the tenets of the nineteenth century. Only a few works trace their way back to the teachings of Scholasticism.[47]

III. Theories Outside the Catholic Orbit

We shall try to make a survey of the various theories of legitimacy held, in the field of political science, by scholars who have been influenced, if at all, only in a negligible degree by Catholic tradition. Our aim is only to make available a knowledge of the leading systems.[48] Criticism will be restricted to a minimum and only broad outlines will be sketched.

[44] E. g., Suarez, Mariana, Grotius, Pufendorf, Chr. Wolff.

[45] Savigny, Ihering; to a certain extent also Kant and Hegel.

[46] *Op. cit.*, pp. 700 seq.

[47] Besides Stier-Somló and Gaudu we may mention here: Anton M. Pichler, *Das Legitimitätsproblem nach der katholischen Moraltheologie,* Viennese Catholic theological doctoral dissertation (1929); P. Tischleder, *Staatsgewalt und katholisches Gewissen* (1927), p. 95 seq.; H. Rommen, *Die Staatslehre des Fr. Suarez* (1927); *idem, Der Staat in der katholischen Gedankenwelt* (1935).

[48] It is difficult to give an approximately complete bibliography. We have tried to collect at least the more important and easily accessible material.

We have mentioned already that modern ideas of political science in regard to legitimacy can not be traced back more than about a century. Only a few years ago Erwin Albrecht made an observation which is true of every sound concept of legitimacy: it originates in religious thought.[49] This is the source whence were derived the tenets of the French philosophers and statesmen, Louis Gabriel Ambroise Vicomte de Bonald,[50] P. Ballanche,[51] and Joseph Maria Comte de Maistre.[52] The latter has been characterized as the "saekulare Kämpfer für die Legitimität und gegen die Revolution"[53] and his work, "the classic of legitimacy".[54] This, however, we think to be an overstatement of the scientific consequences of his work. De Bonald and De Maistre were ardent monarchists and to a great extent combined their opinions with apologetics. This may not be surprising though, as it results from an aversion to the French revolution and the Napoleonic usurpation. De Bonald condemns the sovereignty of the people and recognizes only the sovereignty of God: "Authority comes from God". The ruler is holder—strictly speaking, owner of this authority. But because his authority is God's, men may not depose him. This authority devolves upon his hereditary successors. De Maistre considers sovereignty a Divine law. It manifests itself to men as the necessity to have a ruler. But this can only be the legitimate monarch and only he bestows legitimacy upon the state. Ballanche follows these lines, although he is less outspoken.

In our opinion, the greatest importance of these theories lies in the extent to which they influenced the succeeding champions of the concept of legitimacy. Leo XIII, for many reasons, can be considered De Maistre's disciple.[55] One of the theorists of the Holy

[49] *Das Recht der Revolution* ([1934], p. 122): "Als Bestandteil eines Glaubensbekenntnisses ist die Lehre nicht zu widerlegen. Sie ist nicht eigentlich Wirklichkeitsfremd, sondern sie sieht ein andere Art der Wirklichkeit, in der alle störenden Kräfte böse, dem göttlichen Willen zuwider sind."

[50] *Recherches philosophiques,* 2 vol. (1818, 1853); *La legislative primitive,* 3 vol., (1802; 5. ed., 1857).

[51] *Oeuvres,* 4 vol., especially vol. II, *Essai sur les institutions dans leurs rapport avec les idées nouvelles* (1818).

[52] *Considerations sur la France* (1796); *Oeuvres* (1864); *Oeuvres inedites* (1870); etc.

[53] Kiefl, *op. cit.,* p. 42.

[54] Tischleder, *op. cit.,* p. 102.

[55] E. Soderini, *Il Pontificato di Leone XIII* (1932 seq.).

Alliance, Malte-Brun, used these sources.[56] He, too, attributes sole sovereignty to God. He holds that legitimacy has the characteristics of the inviolability and the perpetuity of laws. His position, however, is uncertain in regard to the question of legitimation, for he denies prescription but considers historic evolution as legitimizing to some extent. De Bonald and De Maistre were more attached to the ideas of Traditionalism while Malte-Brun turned to Romanticism. On the whole, it was Romanticism [57] which paved the way for the entrance of the principle of legitimacy into the orbit of German science, that is to say, into Romanticism itself and the Historical School. The limits between these schools were, it is true, never very definitely or clearly marked. As to Romanticism, Haller's *Restauration der Staatswissenschaften* prepared the field where new or restored theories began to grow. Besides Haller, a Swiss, three Austrian scholars [58] played an important part in its development, Adam Muller, C. E. Jarcke, and Anton von Krauss. In Italy, Count Solaro della Margarita adhered to similar ideas.[59]

Dealing with the principle of legitimacy as the first genuine representative of this movement, Friedrich Julius Stahl [60] was the first German thinker to lay the solid foundation for its development. In his philosophy of law, the monarchy is the only guarantee for the most complete fulfillment—as far as human beings can conceive it—of the Divine Will in regard to the political order. The maintenance of legitimate succession results from this principle, " that the highest authority in the state and the vocation of the person for it is purely the work of Divine disposition, in which no man takes part ".[61] This he considers as " the principle of legitimacy which forms a pair with the Divine authority of kingdom. They are the Christian principles of the state ". For men may not inter-

[56] *Traité de la légitimité* (1825). His teachings are not discussed by Gaudu, *op. cit.*

[57] C. Schmitt, *Politische Romantik* (1925), pp. 159 seq.

[58] F. von Engel-Janosi, " Die Theorie vom Staat in deutschen Oesterreich 1815-1848 "—*ZOR*, II (1921), 360-394.

[59] G. del Vecchio, *Lezioni di Filosofia del Diritto* (3 ed., 1936), p. 114.

[60] *Philosophie des Rechts* (1837), II, 1. and 2. part; J. Heckel, " Der Einbruch des jüdischen Geistes in das deutsche Staats- und Kirchenrecht durch F. J. Stahl "—*Historische Zeitschrift*, LV, 506 seq.

[61] *Op. cit.*, II, 2, I, 82.

fere with the plan of Divine disposition—an idea borrowed from De Maistre. Only the monarchy with its natural order of inheritance, therefore, can be the one and true form of government. It is, furthermore, the only form of government which is able to realize the principle of legitimacy. It is obvious that this concept narrows the basis of the problem of legitimacy. The author continues with these conclusions: "The principle of legitimacy, therefore, constitutes the antithesis: first to the patrimonial principle, that is to say, to the arbitrary cession or partition of the empire through the king as his human property, second to usurpation; and finally to the principle of election and sovereignty of the people." [62]

This extensive restriction of the limits of legitimacy, as made by Stahl, fell far short of the mark, but it clearly expressed one principle: that the legitimate acquiring of rulership is a necessary requisite of the nature of legitimacy.[63] It is not only in its acquisition, however, but also in its nature, that rulership must be in accordance with legitimacy.

Rotteck's concept is interesting, too. It is a widening but also a weakening of the original theory.[64] First of all, he holds that the principle of legitimacy belongs to the sphere of *ius publicum*, having no roots in the sphere of *ius privatum*, especially not in that of dynasties.[65] Furthermore, *legitimate* law is not law which applies only to the prince, but to the people as a whole. The legitimate king has a legal link to his people. His authority is qualified by the fulfillment of his duties. The legitimate inheritance of a throne is not sufficient for a true and complete legitimacy, but the observance of the constitution, loyal administration and service to the common weal. If the regent violates the constitution, his authority ceases to be a legitimate one.[66] Here we observe a double legitimacy; not only the legitimacy of acquisition but also the legitimacy

[62] *Loc. cit.*

[63] Stahl, however, is not entirely consistent, for he presumes that by prescription through the lapse of time even the illegitimate dynasty becomes legitimate: "Was Gott zugelassen und durch die Zeiten erhalten hat, das ziemt der jetzigen Generation. . . ." Brockhaus (*op. cit.*, p. 17) holds that Stahl thinks of "eine Art staatsrechtlicher Verjährung" (cf. Stahl, *op. cit.*, II, 2, p. 254; cf. Brockhaus, *op. cit.*, p. 240).

[64] *Staatslexikon, ibid.*, pp. 476 seq.

[65] Against Haller.

[66] Note the influence of Protestant theology.

of execution, that is to say, an execution within the limits of the constitutional power of the ruler is imperative. These limits, furthermore, are not merely those of positive law; they are determined by the higher criterion of the common weal.

Leaving for a later more thorough discussion this principle of double legitimacy,[67] we observe that Rotteck is influenced by the doctrine of the social contract. He considers it the starting point of every political order of legitimacy. It can not cease to exist either *via facti*, or by law or treaty.

The author discusses the question of the legitimation of an illegitimate power, regarding legitimation as the ratification of a change of the constitution or a dynasty approving those contrary to an existing political order. If the nation recognizes this explicitly — through a plebiscite or through its representatives — or tacitly, then the new political order becomes legitimate. This does not mean that a momentary toleration of such a "new order" suffices; consent is required. Rotteck admits that this consent might be expressed through a prolonged continuation of unprotesting toleration of such a situation. Besides constitutional legitimation, he recognizes also a legitimation by international law as expressed by the practical recognition of the change by a majority of states.

It seems important also to discuss the opinion of Heinrich Zoepfl.[68] According to his theory, the principle of legitimacy is "nothing else but the principle that only a subject who is entitled by historical reasons to the rulership in a state has to be recognized as authorized to rule"[69] He considers the principle of legitimacy of practical significance only for monarchies, especially for hereditary monarchies, while in the case of republics, which "are based upon the principle of the sovereignty of the people, the legitimacy of the rulership [of the people] is never discussed." Legitimacy as an authorization for rulership of a person expands in three directions: 1. in relation to the people, 2. in relation to a previous, at present expelled, dynasty or to its members entitled to rule, and 3. in relation

[67] Cf. *infra*, p. 110.

[68] *Grundsätze des gemeinen deutschen Staatsrecht*, I (5. ed., 1863), pp. 555 seq.

[69] Zoepfl speaks of a "Gewere" as the expression of sovereignty; insofar as the governmental authority is held *de facto* or *de iure*, the sovereignty is worse or better.

to other nations.[70] In a similar way H. A. Zachariä tries to determine the extent and limits of legitimacy.[71] Both theories contain the same difficulties, already recognized by Brockhaus.[72] It is a fact that under certain circumstances, for one reason or another, the limits of legitimacy can not be defined inasmuch as legitimacy is either complete or non-existent.

Of the opponents of the concept of legitimacy from the older school, some outstanding representatives merit mention. One should not omit the view of Friedrich Brockhaus. His essay on the "Legitimitätsprinzip" is still considered to be of no small worth. His deductions led to a singular conclusion: legitimacy is a characteristic which is falsely placed within the realm of law.[73] It is the problem of determining the authority which should be invoked to decide the legitimacy of a claim to rulership which makes him very doubtful about the matter. He denies the possible existence of a court which could decide the legitimate claims of a deposed ruler or of an overthrown government. Legitimacy may be an "appeal to the love of justice of a nation", but it is not a fact relevant to law.

J. C. Bluntschli differentiates between legitimacy and illegitimacy in a striking manner. According to him, legitimacy exists if the holder of the constitutional authority is also its actual possessor.[74] In the same way as possession and ownership do not necessarily coincide, so the "ideal law" and the "real power" can probably stand separately. Usurpation, at first, is only a *de facto* domination. The illegitimate ruler, however, demands the obedience of his subjects through title of the common weal. Any single subject is

[70] *Ibid.*, p. 557.

[71] *Deutsches Staats- und Bundesrecht,* I (3. ed., 1865), 78.

[72] *Op. cit.*, pp. 282 seq.

[73] *Op. cit.*, p. 325: "Sie stellt sich als ein Begriff dar, dem alle seine Verfechter keine juristische Brauchbarkeit verleihen konnten, nämlich als das sittlich und politisch wertvolle, staastrechtlich aber vollständig wertlose Merkmal des Ursprungs eines Monarchen oder einer ganzen Dynastie. Die Legitimität des depossedierten Herrschers wird regelmässig längere Zeit hindurch eine Mahnung an die Sittlichkeit, an die Treue und den Rechtssinn der Nation sein; aber sie ist kein Rechtstitel, auf welchen hin ein vertriebener Fürst seinen Thron wiedergewinnen könnte: es gibt kein Forum, vor welchem, kein Rechtsmittel, durch welches er seinen Anspruch geltend machen, kein Rechtsverhältnis zum Volke, auf welches er sich stützen könnte."

[74] *Allgemeines Staatsrecht,* I (6. ed.), pp. 188 seq.; "Legitimität"—*Staatswörterbuch* Bluntschli-Brater.

not allowed to strive against his authority. Moreover, the legitimate ruler has no power to protect those citizens who are still loyal to him. He may not ask, therefore, that they sacrifice themselves for him. On the other hand, the actual government of the usurper has no power to make the legitimate ruler resign. Nevertheless, the legitimate ruler loses his right as soon as every possibility of realizing it has ceased to exist. Bluntschli thinks that this theory manifests what is the principal influence "which is exercised upon the making of law in the field of constitutional law"; but the innermost concept of legitimacy is certainly not contained in it.

The most outspoken antithesis to the older tenets on legitimacy can be found in the ideas of Jellinek. He holds that the *fait accompli* is the source of law and of the authority of the usurper.[75] Revolutions and violations of constitutions are always the starting point of new legal orders.[76] The notion of the legitimacy of such action is laid down in the "conviction of the rationality of the new order" which carries out "die Umsetzung des Tatsächlichen in Normatives"[77] This is the logical conclusion to which Jellinek's deductions were bound to lead, based as they primarily are upon his refusal to accept the allegedly "falsche Dogma der Geschlossenheit des Rechtssystems" and the "Schein durchgängiger Rechtskontinuität".[78]

The theory of Georg Meyer-Gerhard Anschütz rests on the same basis.[79] The authority of a government is legitimate if it is in ac-

[75] *Allgemeine Staatslehre* (3. ed., 1929), p. 340 seq. There it is said: "Die Ausübung der Staatsgewalt durch den Usurpator schafft sofort einen neuen Rechtszustand, weil hier keine Instanz vorhanden ist, die die Tatsache der Usurpation rechtlich ungeschehen machen könnte . . . Die faktische Innehabung der Staatsgewalt legitimiert allein zur Vertretung des Staates nach aussen; der entthronte legitime Machthaber hat dieses Recht durch das blosse Faktum seiner Entfernung aus der Herrscherstellung verloren."

[76] *Ibid.*, p. 360.

[77] *Ibid.*, p. 353.

[78] *Loc. cit.*

[79] *Lehrbuch des deutschen Staatsrechtes* (7. ed., 1914-1919), p. 26. There it is said: "Legitim heisst eine Staatsgewalt, welche dem bestehenden Rechte gemäss ist; illegitim eine Staatsgewalt, welche gegen das bestehende Recht zur Herrschaft gelangt ist. Der Begriff Legitimität findet ebensowohl auf republikanische als auf monarchische Staatsverfassungen Anwendung. Die Befugnis zur Ausübung der Staatsgewalt ist aber nicht durch den rechtmässigen Erwerb, sondern durch den tatsächlichen Besitz derselben bedingt."

cordance with existing law. It is illegitimate if it attains actual power against an existing authority. But the competency to exercise governmental power is dependent not upon legitimate acquisition but on actual possession. Therefore Anschütz likewise holds that "the *fait accompli* as such" creates new law.[80]

Stoerk [81] holds that governmental authority is a historic fact, regardless of the legitimacy or the illegitimacy of its beginning. This authority receives its legal sanction through the people.

These theories found followers after World War I, especially among those who tried to find explanations for the legitimation of the various revolutions. Pohl is an instance in point.[82] His theory resembles that of Brockhaus in holding that legitimacy is no essential characteristic of the authority of the state. Stier-Somló [83] also belongs to this group. Paul [84] maintains that the removal of the hitherto existing legitimate authority coincides necessarily with the establishment of a new government, for no state or nation can exist, even for a moment, without a government. The state does not die. A new government must come into existence. This existence, as well as the necessity for it, give evidence of its legitimacy, no matter how it gains possession of governmental authority. Sander [85] and Merkl [86] must also be mentioned in this connection. They handle the problem from the standpoint of philosophers of legal positivism.

[80] *Loc. cit.* Cf. Anschütz, *Die Verfassung des Deutschen Reiches* (1921), p. 11.

[81] In Holtzendorff's *Enzyklopädie* (7. ed., 1913 seq.), p. 1049.

[82] *Archiv des öffentlichen Rechts* (XX, 179): "Für das Dasein oder Nichtdasein einer neuen Staatsgewalt ist es leichgültig, ob sie staatsrechtlich 'legitim' ist oder nicht . . . Legitimität ist kein Wesenmoment der Staatsgewalt."

[83] Stier-Somló, *Staatswörterbuch,* III, 933-934; *idem, Reichs- und Landesstaatsrecht,* I (1924), 213 seq.

[84] "Die Gesetzgebungstätigkeit der Revolutionsregierung und ihre rechtliche Grundlage"—*Leipziger Zeitschrift für Deutsches Recht* (1919), pp. 346 seq.

[85] "Das Faktum der Revolution und die Kontinuität der Rechtsordnung"—*ZOR,* I (1919), 132 seq.

[86] "Das Problem der Rechstkontinuität"—*ZOR,* V (1926), 497 seq.; "Die Rechtseinheit des Österreichischen Staates"—*Archiv für öffentliches Recht,* XXXVII (1918), 56 seq.

Carl Schmitt[87] attacks the problem by attempting to separate and clarify the notions of " legality " and " legitimacy ". He does not succeed but rather adds to the confusion.[88] He thinks that one should not overlook the fact that in a modern parliamentary system, terms like " legitimate " or " authority "—if they are used at all—are nothing but alternate expressions for legality and must be treated as such. But, as already indicated, both his language and the deductions it expresses are involved and obscure. He refers to similar views of Adolf Smed,[89] Max Weber,[90] and Otto Kirchheimer.[91] But he is not satisfied with his own conclusions, as appears from the following argumentation cited in his own words: " Der Sprachgebrauch ist allerdings heute schon so weit, dass er das Legale als etwas ' nur Formales ' und das in der Sache Legitime als Gegensätze empfindet. Heute kann man, ohne Widerspruch zu finden, z.B. von einer Reichstagsauflösung sagen, sie sei ' streng legal ' und doch in der Sache ein Staatsstreich, und umgekehrt, sie entspreche in der Sache dem Geiste der Verfassung und sei trotzdem nicht legal. In solchen Antithesen dokumentiert sich der Zusammenbruch eines Legalitätssystems, das in einem gegenstands- und beziehungslosen Formalismus und Funktionalismus endet . . . Dadurch ist auch die Illusions entstanden, man könne allen denkbaren, auch den radikalsten und revolutionärsten Bestrebungen, Zielen und Bewegungen einen legalen Weg und ein legales Verfahren eröffnen, auf dem sie ihr Ziel ohne Gewalt und ohne Umsturz erreichen könnten, ein Verfahren, das gleichzeitig ordnungsstiftend und doch völlig ' wertneutral ' funktioniert."

The only result of these tenets was to lead to a complete collapse of the philosophy of legitimacy. German Romanticism, and to a

[87] *Legalität und Legitimität* (1932), pp. 13 seq.

[88] *Loc. cit.;* there he holds that " der parliamentarische Gesetzgebungstaat mit seinem Ideal und System einer lückenlos geschlossenen Legalität alles staatlichen Vorgehens ein durchaus eigenartiges Rechtfertigungssystem entwickelt hat. ' Legalität ' hat hier gerade den Sinn und die Aufgabe, sowohl die Legitimität (des Monarchen wie des plebiszitären Volkswillens) als auch jede auf sich selbst beruhende oder höhere Autorität und Obrigkeit überflüssig zu machen und zu verneinen. Wenn in diesem System Worte wie ' legitim ' oder ' Autorität ' überhaupt noch gebraucht werden, so nur als Ausdruck der Legalität und nur aus ihr abgeleitet."

[89] *Verfassung und Verfassungsrecht* (1928), p. 115.

[90] *Wirtschaft und Gesellschaft, Grundriss der Sozialökonomik,* III, 1. part (1922), p. 19.

[91] " Legalität und Legitimität "—*Die Gesellschaft* (July, 1932).

certain extent even the Historical School, managed to maintain certain affirmative elements of the principle. But so-called "Rechtspositivismus" failed. It lacked an important component of every philosophy of law, an element absolutely essential in the philosophy of legitimacy: basic moral principles. As soon as law is separated from the sphere of moral principles, all other principles begin to disappear. By neglecting moral principles, Positivism is indeed readily enabled to show that legitimacy is not necessary, that only force, *fait accompli*, brutality count where success is to be achieved. It is a materialism *in extremis* on its way to inferno.

There is no refuge out of this chaos, even for those who try to escape into a "better" world, if the escape is attempted with a desperate effort to preserve at least some residue of materialistic philosophy. We must make it quite clear: Positivism is not the only kind of materialism, and the disease is not confined to *one* race or *one* philosophy. It is a common illness of a declining age. Only by understanding this can one grasp the hopelessness of escaping if any remnants of political materialism are nurtured in the attempt. This is manifested in an actual example in the posthumous work of G. Ferrero dealing with the principles of power.[92] Ferrero's ideas are the more striking in that he does not deny legitimacy but rather emphatically expresses his belief that "it will once more be able to save the world, as it saved Europe in 1814".[93] Nevertheless, his doctrine is but another interlude in this drama.

"Principles of legitimacy are not to be found in philosophy, in religion, in law, or in any of the intellectual culture of the West".[94] They are the human remedies of the last few centuries, "limited and incomplete and . . . of use only in certain situations in history, determined by the orientation of thought, which is subject to change".[95] They are remedies against "the most fearful torment of life—the reciprocal fear between government and its subjects"[96] but they are gifted at the same time "with a magical power . . . the awful fear that results from the violation of a law".[97]

92 Guglielmo Ferrero, *The principles of power* (1942).

93 *Op. cit.*, preface, p. IX.

94 *Op. cit.*, p. 277.

95 *Op. cit.*, p. 314.

96 *Op. cit.*, p. 313.

97 *Op. cit.*, p. 27.

Ferrero holds further that the principles of legitimacy are changing in an ever changing world. "Every age has only one principle of legitimacy, which it finds already established or in process of formation".[98] Analysing history, he meets with four principles of legitimacy:[99] the elective, the democratic,[100] the aristo-monarchic, and the hereditary. These four principles "have for centuries been intermixed, either in conflict or in collaboration. The aristo-monarchic principle has always been inseparable from the hereditary principle. The democratic principle is irreconcilable with the latter and has only reluctantly tolerated a few remnants of it; the elective principle, fundamental for democracies, has also been utilized by monarchies, by aristocracies, and by certain authoritarian institutions like the Catholic Church".[101] To these "historic" principles he then adds today's principle: "the delegation of the power by the people".[102] All these principles are justifications of power, "that is, of the right to rule".[103] But they are "characterized by a complete lack of transcendence; by being just and rational up to a certain point, that is, under certain conditions, and becoming absurd when these conditions are lacking".[104]

In admitting this, Ferrero consequently must also concede "that legitimacy is never a natural, spontaneous, simple, and immediate condition. It is a condition both artificial and accidental, the result of a long struggle that may as easily end in failure. No government is born legitimate; a number of governments become legitimate by being accepted, and for this time is required. A people must become accustomed to their principle of legitimacy".[105]

He differentiates the following conditions of government: illegitimate,[106] revolutionary, pre-legitimate,[107] quasi-legitimate,[108] and

[98] *Op. cit.*, p. 291.

[99] *Op. cit.*, p. 21.

[100] *Op. cit.* (p. 21): "The majority has the right to govern, the minority the the right to criticize the government."

[101] *Op. cit.*, p. 22.

[102] *Op. cit.*, p. 295.

[103] *Op. cit.*, p. 22.

[104] *Op. cit.*, p. 23.

[105] *Op. cit.*, p. 138.

[106] *Op. cit.* (p. 187): "Illegitimate government is the antithesis of legitimate government: a government in which the power is bestowed and exercised according to principles and rules imposed by force over too short a period

legitimate.[109] The basis of legitimacy in a democracy is especially delicate and this is made rather apparent in the three categorical imperatives enumerated by Ferrero as necessary for a legitimate democratic government: viz., a " real " majority;[110] the realization by the majority in control that the government is " by nature variable " with a consequent surrender on its part of " any thoughts of using the government to perpetuate itself—in order to prevent, by means of violence and fraud, the minority from becoming a majority ";[111] and finally on the part of the minority that it must " conduct the opposition in accordance with respect, not only for the letter but also for the spirit of the majority's right to command ".[112] The basis of this " legitimate democracy " of Ferrero's doctrine is human in its beginning and end: " man is now called upon to govern himself both in act and in principle in complete autonomy from religion. So much the worse for him if the difficulties of the task are increasing; so much the better if religion can help him out ".[113] There is

of time and not accepted by a large majority . . ." *Ibid.* (p. 188): ". . . illegitimate government neither desires nor is able to respect the principle of legitimacy by which it pretends to justify the power it imposes on a reluctant people [in contradistinction to pre-legitimate government] ".

[107] *Ibid.* (p. 188): " Pre-legitimate government . . . is a government in which the power is bestowed and exercised according to rules and principles not yet accepted by the people but observed by the government." *Ibid.* (p. 139): " Pre-legitimacy is legitimacy still in its cradle."

[108] *Op. cit.* (p. 217): [quasi-legitimate governments] " are governments, which, without being legitimate, are able to count on a large enough acceptance so as not to be obliged, like illegitimate governments, to make use of corruption, deception, and violence alone. They are assured of this consent, partly by the elements of legitimacy they contain, partly because they are necessary to prevent anarchy."

[109] *Op. cit.* (p. 187): " . . . a government in which the power is established and exercised according to rules long predetermined, recognized and accepted by everyone, interpreted and applied without vacillation or hesitancy but with unanimous agreement, in accordance with the letter and the spirit of the laws, re-enforced by traditions. England and Switzerland, for instance." But not the Republic of Weimar, the Third French Republic from 1871 to 1900 and the Spanish Republic of 1931, which were all, according to Ferrero, pre-legitimate (p. 139).

[110] *Op. cit.*, p. 176.

[111] *Op. cit.*, p. 177.

[112] *Loc. cit.*

[113] *Op. cit.*, p. 302.

no place left in Ferrero's world for eternal rules and an eternal ruler. Authority has ceased to come from God.[114]

These are Ferrero's ideas. The principles of legitimacy, in the sense of this doctrine, " are fragile, but everything depends upon these fragile things. How will Western civilization be able to save them? By learning to respect them as sacred, even though they are fragile creations of its own contradicting mind, and full of fears . . ." [115]

IV. Catholic Theories

There can be no doubt that Traditionalism and Romanticism on the one hand and Catholic-minded political science on the other have influenced each other.[116] It is also true that European liberalism, modernism, individualism and rationalism, that is, all those philosophical movements which aimed more or less at positivism, caused to a great extent the awakening and strengthening of the potentialities of Catholic philosophy of law. This went so far that a modern Catholic scholar, Rommen, unquestionably an opponent of the philosophy of legitimacy, was able to say of that period that Catholic political science was in danger " dem Legistismus zu verfallen ".[117] It is, in our opinion, missing the point to speak of danger in such a context, for we shall find eventually that Catholic political science ought to have the same fundamental principles as a clearly perceived and correctly conceived doctrine of legitimacy.[118] Nevertheless, the Catholic concept did inspire a considerable group of outstanding scholars who thenceforth dedicated themselves to the advancement of the claims of the principle of legitimacy. Some of them, like Cathrein and Meyer, should be considered as prototypes of the older school, and their ideas should, therefore, be discussed more particularly. Others, however, must be mentioned as well, though a discussion of the details of their tenets need not be profuse.

Among the earlier scholars of the older school one notes the work of the Jesuit Luigi Taparelli d'Azeglio, the value of whose contribution to the revival of Scholasticism is beyond question. He became

[114] *Op. cit.*, pp. 291, 301.

[115] *Op. cit.*, p. 314.

[116] C. Schmitt, *loc. cit.*; P. Tischleder, *Staatsgewalt*, pp. 101 seq.

[117] *Der Staat in der katholischen Gedankenwelt*, p. 200.

[118] Cf. *infra*: VI. The Problem of Legitimacy.

the beloved master of a whole generation.[119] The labors of Cardinal Tommaso Maria Zigliara, O.P., essential as they were to the victory over Traditionalism, yielded much fruit also in the clarification of the discussions on the problem of legitimacy.[120] The patriarch among the German Catholic scholars was Joseph Held, whose teachings were based upon a profound knowledge of philosophy and jurisprudence.[121] The canonist, Ferdinand Walter of Bonn, is also worthy of esteem for his study of this question. An outstanding scholar in Canon Law, he made no mean contribution to the development of Catholic teaching on legitimacy.[122] Both Cardinal Hergenröther [123] and his brother, Philip Hergenröther, the canonist,[124] also members of the older school, made successful studies of the problem. Among the younger members of the school should be mentioned Ludwig Freiherr von Hammerstein,[125] who swelled the notable list of canonists among the "legitimists";[126] George Graf Hertling;[127] and the Jesuit Heinrich Schrörs (+ 1928), who linked the epigons of the older school with our generation.[128]

Participation in the discussion of our problem was not confined to the studies of scholars. The Church, as such, took an active part also. It was forced to do this in order to defend its own rights against the intrusions of secular power. It will suffice to glance briefly at the extremely menacing situation in which the Church was

[119] *Saggio teoretico di diritto naturale,* 2 vol. (1840-1845).

[120] *Saggio sui prinzipii del Tradizionalismo* (1865); *Summa philosophica* (1876).

[121] *Über Legitimität, Legitimitätsprinzip* (1859); *Staat und Gesellschaft vom Standpunkt der Geschichte der Menschheit und des Staates,* 3 vol. (1861), (especially the bibliography in vol. II); *Der Mensch als Ausgang der Rechtsphilosophie* (1883).

[122] *Naturrecht und Politik* (2. ed., 1871).

[123] *Katholische Kirche und christlicher Staat,* 2 vol. and supplements (1872, 1873, 1876); *Der Kirchenstaat seit der Französischen Revolution* (1860).

[124] *Der Gehorsam gegen die weltliche Obrigkeit und dessen Grenzen* (1877).

[125] *Winfried oder das soziale Werken der Kirche* (4. ed., 1895); cf. also observations in numerous other publications.

[126] It might be interesting to note that the starting point of Joseph Held was also Canon law. Cf. *De iuris canonici circa usuras interdictis* (1840).

[127] *Naturrecht und Sozialpolitik* (1893).

[128] Bibliography in *Annalen des Historischen Vereins für den Niederrhein,* CXIV (1929).

placed as a result of the French revolution, the Napoleonic wars, the various other revolutions, and the political and social changes that followed upon these historic events. Further peril arose from the advent of radical tenets in philosophy which accompanied and resulted in anti-religious movements.

The first, in spite of some objections made by certain scholars, essential crystallization of the official ecclesiastical point of view was the famous Encyclical "*Quanta cura*" [129] of Pius IX of December 8, 1864, which included a "*Syllabus*" [130] comprising a summary of certain contemporary errors against which the Pontiff had on various previous occasions directed his censure. Especially in § VII, the "*Syllabus*" deals with "errores de Ethica naturali et christiana".[131] But thesis 39 of § VI also belongs to our prob-

[129] *Acta Sanctae Sedis,* III (1867), 160 seq.

[130] Cf. Ch. Schrader, S.J., *Der Papst und die modernen Ideen,* nr. II (2. ed., 1866); F. Heiner, *Der Syllabus in ultramontaner und antiultramontaner Beleuchtung* (1905). As to the importance of and the obligation rising from the "*syllabus*" as an authentic decision—its character of an infallible papal decision is in doubt—see the article s.v. "*Syllabus*" (W. Reinhard)—*Lexikon für Theologie und Kirche,* IX (1937); there also may be found a rather complete bibliography.

[131] § VII—Thesis 56: "Morum leges divina haud egent sanctione, minimeque opus est ut humanae leges ad naturae ius conformentur aut obligandi vim a Deo accipiant."

Thesis 57: "Philosophicarum rerum morumque scientia, item civiles leges possunt et debent a divina et ecclesiastica auctoritate declinare."

Thesis 58: "Aliae vires non sunt agnoscendae nisi illae quae in materia positae sunt, et omnis morum disciplina honestasque collocari debet in cumulandis et augendis quovis modo divitiis ac in voluptatibus explendis."

Thesis 59: "Ius in materiali facto consistit, et omnia hominum officia sunt nomen inane, et omnia humana facta iuris vim habent."

Thesis 60: "Auctoritas nihil aliud est nisi numeri et materialium virium summa".

Thesis 61: "Fortunata facti iniustitia nullum iuris sanctitati detrimentum affert".

Thesis 62: "Proclamandum est et observandum principium quod vocant de non-interventu".

Thesis 63: "Legitimis principibus obedientiam decretare, immo et rebellare licet."

Thesis 64: "Tum cuiusque sanctissimi iuramenti violatio, tum quaelibet scelesta flagitiosaque actio sempiternae legi repugnans, non solum haud est improbanda, verum etiam omnino licita, summisque laudibus efferenda, quando id pro patriae amore agatur."

lem.[132] It should not be forgotten that as early as 1849[133] the Bishop of Perugia, later Pope Leo XIII, had urged a general condemnation of all contemporary errors. This he did at the Synod of Spoleto whose spiritual leader he was. It is not surprising then that in the statements of Leo XIII we meet again certain of the thoughts of Pius IX.

The "*Syllabus*" is no systematical research, but a very important basis for further development. It provoked many discussions and even Catholic circles did not always show it favor. The discussions ranged from a full acceptance of its teachings to the attempt silently to eliminate it from modern Catholic philosophy of law.

Theodor Meyer, S.J., made it the starting point of his outstanding research on *Die Grundzüge der Sittlichkeit und des Rechts.*[134] His dominant idea is that every legal title (*Rechtstitel*) must be based on a moral idea. He declines, therefore, and in accordance with thesis 59 of § VII, the unconditional equalization of the notions of legitimacy and *fait accompli.* The *de facto* action does not bestow a legal title. Such a title can be given only by a moral idea on which such an act must be based. A *de facto* injustice, that is to say, an act committed against the commandments of the eternal order, can not, therefore, establish morally binding law. The question whether or not an authority is legitimate can be answered only by the existence or the non-existence of a true title. Such a title may be by legitimate acquisition or by subsequent ratification. Otherwise there is nothing but usurpation.[135]

[132] § VI: "Errores de societate civili tum in se, tum in suis ad Ecclesiam relationibus spectata". Thesis 39: "Reipublicae status, utpote omnium iurium origo et fons, iure quodam pollet nullis circumscripto limitibus."

[133] Tischleder, *Leo,* p. 12; Lansberg, *Die Welt des Mittelalters und wir* (1923), p. 77; E. Soderini, *Il Pontificato di Leone XIII* (1932).

[134] 1868.

[135] *Op. cit.* (pp. 216 seq.): "Dass bestehende Gewalt und legitime Gewalt nicht gleichlautende Begriffe sind, und dass erstere nach dem Masstabe der sittlichen Ordnung einer Unterscheidung unterliegt, ist eine jener Wahrheiten, welche nur mit dem Rechtsgefühl der Menschheit selbst verdunkelt werden können . . . Nie ist also eine materielle Tatsache, von welcher Beschaffenheit sie sein möge, an und für sich ein Rechtstitel; dieser ruht einzig und allein in der sittlichen Idee, die sich an die erste anlehnt, in der notwendigen Beziehung zur ewigen Ordnung, der sie den bestimmten Ausdruck verschafft. Viel weniger also kann eine "tatsächliche Ungerechtigkeit", eine Tatsache, die sich mit der ewigen Ordnung in direkten Widerspruch setzt, als solche

Even Brockhaus admitted that usurpation is always an act of force: "dessen Ausführung dem glücklichen Usurpator auch nicht die die entfernteste Möglichkeit eines gutgläubigen oder gar titulierten Thronbesitzes übrig lässt." In accepting this Meyer raises the question of obedience.[136] In accord with Taparelli,[137] he distinguishes between the authoritative power *per se* and the possession of this authority. He considers usurpation a pretended and illegitimate possession which does not touch the real authority. The latter retains, even in the hands of the usurper, its origin in Divine law, an authority originating from God. It can be seized from the legitimate possessor, but it does not as a consequence cease to exist, nor does it lose by this violation the internal consecration of its Divine origin; it remains legitimate as such. The duty to obey this authority results from this origin. The subject does not obey the usurper, but the authority *per se* as an institution of Natural Law. The fact that the usurper gained actual possession of this power does not, however, legitimate *his* action. By this process of reasoning Meyer has right to the credit for the development of a better understanding of the essential distinction between authority and the person in possession of it. This merit is his due in addition to that which is owed him as one of those scholars who rallied greater support to the principle of the necessary connection between moral principles and law.

It is significant that especially the more recent followers of the concept of the sovereignty of the people have attempted to summon the ideas of Pope Leo XIII to the support of their own doctrine.[138] Tischleder even took the trouble to make a special critical survey

ein Recht begründen. Es steht somit fest, dass jede "menschliche Tatsache" —in unserem Falle jede tatsächlich bestehende Gewalt—eine höhere Norm anerkennen muss, nach der sie entweder als zu Recht oder nicht zu Recht bestehend erscheint. Die Antwort auf die gestelle Frage ist daher zunächst einfach die: Die Rechtsmässigkeit oder Unrechtsmässigkeit einer Obrigkeit wird bedingt oder nicht bedingt durch das Vorhandensein oder nicht Vorhandensein eines wirklichen Rechtstitels, auf welchen der Besitz derselben sich stützen kann, sei es, dass dieser Rechtstitel ursprünglich im rechtmässigen Erwerb derselben gefunden wird oder erst durch ein nachträgliches Korrektiv sich zu einem solchen entwickelt hat. Im verneinenden Fall ist sie eine Usurpation."

[136] *Op. cit.*, p. 233 seq.

[137] *Naturrecht*, I, 321.

[138] Especially Mausbach, Tischleder, Rommen.

of the political doctrines of the Pope in order to justify his own ideas.[139] As far as our problem is concerned, however, there is no need to deal with the Pope's concept of political science as a whole.[140] His notion of governmental authority, however, offers an important lead towards the comprehension of his opinion about legitimacy.

In regard to this question, the Pope's attitude was not quite uniform. Considering the fact of this development in his view, one should note that in more than one aspect Bishop, and later Cardinal, Joachim Pecci differed from the Pope, Leo XIII. It has been established that, to a certain extent, Pecci received an intellectual stimulus from the ideas of De Maistre. In regard to the field in which his doctrine is applied, it cannot be overlooked that the Pope is not entirely consistent, assuming divergent attitudes when dealing with the " Roman question " and, on the other hand, when discussing the problem of the recognition of a political authority. Even Tischleder — who tries to trace an unwavering line through the Pope's statements—has to admit this.[141] It is obvious that there is a discrepancy in the Pope's attitudes; and to point it out is far from being new.

However, an unquestionable point in the Pope's doctrine is the clear distinction he draws between authority and the person who exercises it. Revolt against authority *per se*, at any rate, is illicit.[142] Resistance, always remaining within the limits of moral principles,[143] must not be directed, therefore, against the authority, but only against the person who misuses it. This very strict distinction appears also in Leo's famous attitude as to the recognition of the French Republic by Catholics. It is clearly emphasized in "*Au milieu*" of February 16, 1892,[144] and " *Notre consolation* " of May 3, 1892.[145] In these documents the Pope had two chief goals: first, to denounce the untrue assertion that monarchy is the only permis-

[139] *Die Staatslehre Leos XIII* (1925); cf. also *Staatsgewalt und katholische Gewissen* (1927).

[140] See also Schilling, *Die Staats- und Soziallehre des Papstes Leo XIII* (1925), (many references are available in this work).

[141] Tischleder, *Leo,* pp. 363 seq.

[142] H(erder) E(dition), II, 347.

[143] HE, II, 371; HE, III, 113; HE, II, 217; Tischleder, *Leo,* pp. 224, 229 seq.

[144] *Acta Sanctae Sedis* XXIV (1891-1892), 519 seq.

[145] *Acta Sanctae Sedis,* XXIV (1891-1892), 641 seq.

sible and rightful form of government;[146] and secondly, to oppose the idea that political authority must be obeyed, "no matter who might possess it." In "*Au milieu*", he proceeds further to discuss the reasons requiring that even the illegitimate administrator of governmental power must be obeyed. Tischleder is right when he says that Leo XIII combined "politische Klugheit und philosophischen Tiefblick".[147] It was this particular strength which enabled the Pope to meet many difficulties. At the same time, however, it was an obstacle to thoroughness in the exposition of his doctrine because, for tactical reasons, he was compelled to avoid precise clarification of certain questions. Thus he passes over the difficulties of the French case by eluding the question of legitimacy in the acquisition of governmental authority. He states very clearly instead that the possession of authority has nothing to do with the authority itself: "Celui-ci continue d'être immutable et digne de respect; car, envisagé dans sa nature, il est constitué et s'impose pour pouvoir au bien commun, but suprême qui donne son origine à la société humaine".[148] Then the document continues: "Et ce grand devoir de respect et de dépendance persévérera, tant que les exigences du bien commun le demanderont, puisque ce bien est, après Dieu, dans la société, la loi première et dernière".[149]

[146] Tischleder, *Leo,* p. 250 seq.; *Acta Sanctae Sedis,* XXIV (1891-1892), 523. The Pope's words are: "Divers gouvernements politiques se sont succédés en France dans le cours de ce siècle, et chacun avec sa forme distinctive: empires, monarchies, républiques. En se renfermant dans les abstractions, on arriverait à définir quelle est la meilleure de ces formes, considérées en elles-mêmes, on peut affirmer également en toute vérité que chacune d'elles est bonne, pourvu qu'elle sache marcher droit à sa fin, c'est-à-dire le bien commun, pour lequel l'autorité sociale est constituée; il convient d'ajouter finalement, qu'à un point de vue relatif, telle ou telle forme de gouvernement peut être préferable, comme s'adaptant mieux au caractère et aux moeurs de telle ou telle nation. Dans cet ordre d'idées spéculatif, les catholiques, comme tout citoyen, ont pleine liberté de préférer une forme de governement à l'autre, précisément en vertu de ce qu'aucune de ces formes sociales ne s'oppose, par elle-même, aux donées de la saine raison, ni aux maximes de la doctrine chrétienne." As to the question of form of government see: W. Parsons, S.J., "Which Way Democracy?" and "St. Thomas Aquinas and Popular Sovereignty"—*Thought,* XVI, 62, 473 seq. Cf. also the contrary opinion of M. J. Adler-W. Farrell, O.P., "The Theory of Democracy"—*The Thomist,* III, 428 seq., 551 seq., IV, 449 seq.

[147] *Leo,* p. 255; cf. also Soderini, *op. cit.,* II (as to the French and Italian policy of the Pope).

[148] *Acta Sanctae Sedis,* XXIV (1891-1892), 525.

[149] *Acta Sanctae Sedis, loc. cit.*

The controversy over the recognition of the Third Republic by French Catholics induced the Pope to address "*Notre consolation*" to the French bishops. It has become famous because of the Pope's suggestion: "Acceptez la République, c'est à dire le pouvoir constitué et existant parmi vous; respectez; soyez-lui soumis comme représentant le pouvoir venu de Dieu". Herein the Pope again points out that the common weal is "le principe créateur, il est l'élément conservateur de la société humaine".[150] As soon as regular authority exists within a community and actually exercises governmental functions, the common weal is attached to this power and it must, for this reason, be accepted. After the resistance encountered by the Pope's first encyclical, there is included here at least an intimation of the question of the legitimacy of possession of the executive power: "Ces changements sont loin d'être toujours légitimes à l'origine il est même difficile qu'ils le soient. Pourtant le criterium suprême du bien commun et de la tranquillité publique, impose l'acceptation de ces nouveaux gouvernements établis en fait à la place des gouvernements antérieurs qui en fait, ne sont plus. Ainsi se trouvent suspendues les régles ordinaires de la transmission des pouvoirs, et il peut se faire même qu'avec le temps elles se trouvent abolies." The Pope obviously touches the ticklish problem of legitimacy, but again he avoids stating a clear opinion of his own. In spite of the greatness of his philosophical system, this remains a controversial point, due undoubtedly to the delicate position in which the Pope was placed because of the critical situation of the Church in France. After the publication of "*Notre consolation*", the question of legitimacy in the Pope's philosophy offered wide opportunity for speculation and two very distinct opinions arose. Even radicalism seized the opportunity in support of the erroneous ideas of the French Sillon.[151] Hecker also makes use of the Pope's name in an attempt to justify his own view.[152] In recent years Gaudu,[153] Tischleder,[154] Mausbach,[155] Rommen,[156] and Merkl,[157] by

[150] *Acta Sanctae Sedis,* XXIV (1891-1892), 643.

[151] Tischleder, *Leo,* pp. 259 seq.

[152] *The church and the age* (1898).

[153] *Op. cit.,* especially p. 789 where the author says: "Le gouvernement de fait, en vertu de la nécessité de l'ordre social, exerce légitimément tous les pouvoirs."

[154] *Leo; Staatsgewalt.*

[155] *Kulturfragen in der deutschen Verfassung* (1920).

referring to Leo, hold that the common weal is *the* principle of legitimacy, while Kiefl,[158] Zessner-Spitzenberg,[159] Pichler,[160] Engert[161] and the present writer[162] share the opinion that the attitude of the Pope in the French case does not mean that he wished to have the problem of legitimacy understood in that way.

This view is based on many adequate grounds available in the Pope's teachings. First of all, there can be no doubt that Pecci, before he became Pope Leo XIII repeatedly declared himself very strongly in favor of the principle of legitimacy.[163] But we have an even stronger argument in the Pope's attitude in connection with the Roman question. Exception might be taken here on the ground that two entirely distinct provinces are involved. In one case it is the state whose existence and kind of government is not subject to any positive commandment *divini iuris*; in the other, it is the Church with an unchangeable Divine basis and the positive assurance of her own existence until the end of time. But really this is beside the point. Even Tischleder has to admit: "Leo geht hier nicht so unmittelbar, wie man es wünschen möchte, auf die Schwierigkeiten ein".[164] Moreover, the discrepancy in the Pope's attitude was clearly felt by himself. When the French Catholics complained of this inconsistent attitude, Leo XIII answered in "*Notre consolation*": "On a prétendu qu'en enseignant ces doctrines, Nous tenions envers la France une conduite autre que celle que Nous suivons à l'égard de l'Italie; de sorte que Nous trouverions en contradiction avec Nous-même. Et cependant il n'en est rien. Notre but, en disant aux catholiques francais d'accepter le gouvernement constitué, n'a été et n'est autre encore que la Sauvegarde des intérêts

[156] *Der Staat in der katholischen Gedankenwelt* (1935).

[157] "Die Staatsbürgerpflichten nach katholischer Staatsauffassung"—*ZOR*, XVII (1937), 1 seq.

[158] *Loc. cit.*

[159] "Legitimität und Legalität"—*Die Österreichische Aktion* (1927), pp. 163 seq.

[160] *Loc. cit.*

[161] J. Engert, "Die umstrittene Frage der Legitimität"—*Schönere Zukunft* (1928), n. 48; *idem*, "Der Ursprung der Staatsgewalt"—*Schönere Zukunft* (1928), n. 46.

[162] W. Plöchl, *Das Legitimitätsproblem und das kanonische Recht* (1938).

[163] Soderini, *op. cit.*, I, 170 seq.

[164] *Leo*, p. 357.

religieux qui Nous sont confiés. Or ce sont précisément ces intérêts religieux qui Nous imposent, en Italie, le devoir de réclamer sans relâche la pleine liberté requise pour Notre sublime fonction de Chef visible de l'Eglise Catholique, préposé au governement des âmes; . . ."

This raises the question: what about the common weal as the supreme principle of legitimacy if it can not be applied to the Italian state? We doubt whether Tischleder is right when he grasps at the conclusion: "Der rechtsphilosophische Grundsatz [namely, the legitimate power of the common weal] trifft nach Leo auf Italien nicht zu, denn das Gemeinwohl wie die nationale Einheit des italienischen Reiches wäre auch ohne Bedrohung der weltlichen Herrschaft des Papstes, ja im Verein mit ihr zu erreichen, während in Frankreich die republikanische Staatsform die tatsächlich allein mögliche ist, und darum das Gemeinwohl nur durch sie, aber nicht gegen sie erreicht werden kann".[165] But this argument, clearly partisan, is not very striking. In our opinion it does not do justice at all to the real issue of the problem in view.[166] We hold that the Pope did not indulge in such subtle speculation. It rather seems to us that—as far as political science is concerned—he wished to clarify only one very important question: the moral obligation to obey authority *per se*. It is precisely the Italian which makes it evident that there is nothing in the Pope's doctrine which could support the belief that the common weal is the only and the absolute measure of legitimation. It is just the contrary. There is no doubt that the Pope was an outstanding philosopher and an excellent statesman. This is clearly manifested in his ingenious distinction between authority and its holder, which became an essential tenet of modern Catholic political science. The Pope indeed answers in the affirmative the question of the binding competency of authority. But, except for a few incidental references, he passes over the question of the legitimacy of the tenure of him who actually holds authority. He did this probably because of the difficulty of both the problem and the situation.[167] It is Leo's unyielding attitude towards the Roman question that clearly reveals his personal acceptance of the principle of legitimacy. And this not only in the

[165] *Leo,* pp. 361 seq.

[166] See also Zessner-Spitzenberg, *Legitimität und Legalität,* p. 175; Cardinal D. Minoretti, "Autorità e potere legittimo"—*Il diritto concordatario* (1936), pp. 110 seq.

[167] Gaudu, *op. cit.,* pp. 347 seq.: Les Faites depuis 1789 en France.

province of Canon Law but also in that of the constitutions of states. Thus, in our opinion, one can reconcile, at least in principle, the discrepancies in the doctrine of this great pope.

Outstanding in the clarification of the problem of legitimacy from the Catholic point of view is the Jesuit, Victor Cathrein,[168] whose philosophy of Natural Law is relied on as one of the principal starting points for the study of this subject.[169] Cathrein holds that the legitimate ruler is competent, " sich gegen den Eindringling mit Gewalt zur Wehr zu setzen, und dass die Untertanen die Pflicht haben, ihn in der Verteidigung zu unterstützen ".[170] He is far from agreeing with those whose opinion it is that the common weal is the only legitimating force. Rather he makes a novel distinction: " Obwohl der eigentliche Zweck der öffentlichen Gewalt das Gemeinwohl ist, so hat doch die legitime Herrscherfamilie ein Recht auf den Besitz dieser Gewalt, weil sie dieselbe rechtmässig erworben hat . . . Wer sie deshalb unbefugt aus dieser Stellung zu verdrängen sucht, verletzt nicht nur die Gesamtheit als solche, die er ihres rechtmässigen Hauptes beraubt, sondern auch die legitime Dynastie, und diese ist zur Gegenwehr berechtigt ".[171] Resistance, by force, though, is allowed only as long as the usurper has not yet gained complete possession of his power. Mere possession does not bestow competence. Together with the legitimists Cathrein denies the theory of the *fait accompli*: " Die Theorie der vollendeten Tatsachen ist die Theorie der Revolution, die Leugnung jedes Rechts ".[172] But once the usurper has gained control, he may demand submission for the sake of the common weal. This does not settle the question of the legitimation of his administration. Cathrein therefore attacks the latter problem and tries to explain the transition to legitimacy in the following way: he recognizes that under certain conditions acquisition by prescription is possible. In any case, the right of the legitimate ruler does not cease to exist as long " als er ohne allzu schwere Opfer für die Gesamtheit in seine Stellung eingesetzt werden kann ".[173] But when this becomes morally impossible, Cathrein sees a demand of the common weal " dass man das Recht des

[168] *Moralphilosophie*, 2 vol. (6. ed., 1924).

[169] *Op. cit.*, I, 513 seq., 555 seq.

[170] *Op. cit.*, II, 709.

[171] *Loc. cit.*

[172] *Loc. cit.*

[173] *Op. cit.*, II, 711.

Prätendenten als erloschen ansebe, oder dass es dem Recht der Gesamtheit auf das öffentliche Wohl weiche". He does not deny the right of the exiled prince, but he considers it to be a private right subordinated to the common weal. As to when the moral impossibility of restoring the original government becomes operative to displace the old regime and ratify the new, Cathrein believes that its operation should be postponed for several generations. But it is essential that a moment should arrive if the new administration is ever to become legitimate. "Ob man nun diese Erwerbsart der öffentlichen Gewalt Verjährung bzw. Ersitzung oder sonstwie nennen wolle, ist ein Wortstreit".[174] Our review must therefore reluctantly conclude that Cathrein unfortunately did not carry his analysis to any satisfactory conclusion. He intermixes juridical and philosophical notions and makes an unusual distinction as to the prince's right based on public and private law. The consequent confusion comes to a head when he deals with the question of legitimation which he can not solve decisively.

The revolutions and the political changes of 1918 also raised the question of legitimacy. It is easily understood, therefore, that they should have stirred some reaction in Catholic philosophy of law. It is far from our purpose to attempt an enumeration of all the respective problems that arose. We shall again be content with an outline of the main tenets. Not only did the events of 1918 occasion new approaches in the study of this question, but they also gave them—at least in the beginning—definite purposes. In Germany the controversies centered around the acceptance of the Weimar Republic and the overthrow of all the German dynasties. The issue had a different aspect in Austria, resulting in the development of a distinctly Viennese School.[175] From the scientific standpoint there was a remarkable difference. In Germany it produced several scholarly opponents and but a few advocates of the principle of legitimacy, while in Austria no scholar can be found who made a special scientific issue of opposition to legitimacy. This does not mean, of course, that the idea was entirely unopposed.

As far as Germany is concerned, three adversaries of the principle must be mentioned: Joseph Mausbach, Peter Tischleder and Heinrich Rommen. Franz Xavier Kiefl and Joseph Engert are its defenders. For the purpose of scientific discussion the strongly

[174] *Op. cit.*, II, 712.

[175] See *infra*: V. The Viennese School.

polemic character of their writings is to be regretted, especially in the case of Tischleder and Kiefl who, at times, waged quite a formidable paper war.

It was the tendency of Tischleder to invoke Leo XIII's alleged ideas in order to strengthen his own findings that the common weal is the one and only reason for legitimation and, therefore, the true source of legitimacy.[176] He attempted to explain his doctrine in greater detail in a special study,[177] directed principally against the criticism of Kiefl. Therein he also referred to the authority of Leo XIII and pointed again at " das schöpferische Prinzip des Gemeinwohls und nicht die Verjährung oder die vollendete Tatsache als sittlicher Rechtsgrund für das völlige Erlöschen dynastischer Rechte ". He proceeds then to a more specific discussion of the principle of legitimacy. Referring to Cathrein, he pretends that the modern idea of legitimacy would lead essentially to the assertion that the legitimate king of a hereditary monarchy could be deprived of his rights neither by usurpation nor by *fait accompli*, for he would have his authority immediately from God.[178] Thus he reasons that the modern theory of legitimacy could not deny its spiritual relationship to the thought of Absolutism. Its whole significance as a philosophical system depends upon its origin as a reaction against the French Revolution. He holds, then, that Catholic political science in its struggle against Rousseau fell into a " Tutiorism " and condemned the Scholastic theory of indirect " Gottherkunft " of dynastic power, thus restricting the assistance of the people through the faculty of designation, " diese angeblich organische Staatsauffassung ".[179] He denies the principle of legitimacy because he holds that " die Legitimität nicht mehr wie in der scholastischen Theorie [180] vorwiegend verstanden wird als die sittlich geforderte Übereinstimmung der Gesetze und Gesetzgebungsgewalt mit ihrem Wesensziel, dem Gemeinwohl, sondern lediglich

[176] *Op. cit.*, pp. 255 seq.; see his *Staatsgewalt und katholisches Gewissen*, pp. 76 seq.

[177] *Staatsgewalt und katholisches Gewissen* (1927).

[178] *Leo*, pp. 96 seq.

[179] He refers also to L. Billot, *Tractatus de Ecclesia Christi* (1921), and G. Breton, " *Das göttliche Recht der staatlichen Souveränität nach J. de Maistre* (1927); see also *Staatsgewalt*, pp. 128 seq., 159 seq.

[180] He puts it in the manner of Rommen—*Die Staatslehre des Franz Suarez* (1927).

oder doch vorwiegend als das Recht einer bestimmten Dynastie auf die höchste Gewalt im Staate, also mehr im rein formellen Sinn eines unbedingten Konservativismus; ja schliesslich wurde sie sogar als die absolute Univerlierbarkeit und Unerlöschbarkeit dynastischer Rechte aufgefasst." These are, according to Tischleder, the alleged contents of the modern principle of legitimacy. We have already given some outline of the principal developments of the various doctrines and have shown certain distorting changes that appeared during the nineteenth century. The picture which is given by Tischleder, however, exaggerates the shadows unnaturally and deviates from the true reality. The reason for this is Tischleder's fervent dispute with his opponent Kiefl. But the latter, too, chooses a way of writing which, to a great extent, deprives his work of its scientific value. On the other hand, it is Tischleder's partisanship which causes him to ignore the real issue of the problem.

Rommen is only a little less partisan. He starts from the entirely true assumption that Natural Law is not the stop-gap of positive law, but rather its basis. Positive Law, therefore, is only of obligation so far as it is not contrary to Natural Law.[181] This is a principle which—as we shall see [182]—is of very great importance in regard to our problem. It is, as we hold, the clearest expression of the principle of legitimacy. But as Rommen looks at it, this is not the point. He digresses from it by further proclaiming the common weal as the absolute and exclusive norm, no matter whether or not it lacks the moral premises: "Die einzige und ausreichende Legitimation der Staatsgewalt ist das Naturrecht und die Erfüllung ihrer Pflicht dem Gemeinwohl gegenüber".[183] For the same reason he makes the statement that in Catholic political science it is not the query for the sources of governmental authority which holds the center of interest, but the idea of the common weal.

Out of this attitude Rommen commences criticizing legitimism and in doing so further confuses merely political ideas with legal theories. He calls legitimacy a flat positivism, "der die 'Geschichte' und ihre Kräfte, die rein menschlichen Umstände des politischen Werdens zu 'göttlichen' Gesetzen erhebt, dem die Dauer der

[181] *Der Staat in der katholischen Gedankenwelt"* (1935), p. 89.

[182] See *infra,* p. 108.

[183] *Op. cit.,* p. 188.

[184] *Op. cit.,* p. 227.

Herrschaft, hier die Monarchie, dort die 'Demokratie' legitimiert".[184] By the manner of his explanation, Rommen endeavors to reduce the theory of legitimacy to mere formalism and to identify it with legal positivism. In this matter he distinguishes himself from Tischleder. But by his position he, too, misses the point. Finally he holds: "Der Legitimismus ist eine Sackgasse staatsphilosophischen Denkens".[185] But this description explains nothing. It may be interesting to add that he ascribes a "leis pessimistische Kulturauffassung" to legitimism, for—in his opinion—the legitimists attribute the maximum value to the idea, "dass 'Ordnung' sei überhaupt".[186] Against this "pessimism" he sets a very particular concept of the democratic idea: "Der extrem demokratische Gedanke pfeift auf die Ordnung als solche. Er will die jeweils richtige, drum gerechte Ordnung. Er ist für Fortschritt und löst die durch die Dauer geheiligte Ordnung".[187] He holds that because of the preponderance of the principle of order in the tenets of legitimism "bis zu dem [i. e., legitimism] des 20. Jahrhunderts", the common weal as a central notion has been pushed into the background.

Exaggeration is unfortunately characteristic of the ideas of both Tischleder and Rommen. As outlined above, their concept of legitimacy and of the development of its philosophy diverges from the truth historically as well as from the juridical and philosophical standpoints. At least, their analysis does not at all fit the really modern idea of legitimacy. They have built wind mills and created phantoms against which they battle—victoriously. The real characteristic of the principle of legitimacy, however,—in spite of their many references to Natural Law and scholasticism—they leave untouched and unexplained. This is the mistake in method of these modern opponents of our principle.

V. The Viennese School

As in the case of the Weimar Republic, the destruction of the Austro-Hungarian Empire and the subsequent establishment of new

[185] *Op. cit.*, p. 229.

[186] *Op. cit.*, p. 230. We hold that the principle of order is an essential characteristic of morals and therefore of the common weal—cf. W. Parsons, S.J., "The principle of order in politics"—*The New Scholasticism*, XVI (1942), 1-8.

[187] *Op. cit.*, pp. 230 seq.

governments in various parts of the realm created controversies about the legitimacy of these new political institutions. Although we shall again refrain from discussing political issues,[188] we must trace briefly the development that occurred in the philosophical concept. Not until 1927 did the outlines of such a philosophy take shape and it was several years before they were adopted by political legitimism. It must not be forgotten that at first the tenets of the new Viennese School met with criticism emanating from many quarters, even from legitimist extremism which could not reconcile itself to the new situation. It seems to us one of the principal merits of the School that it based its concept on purely philosophical principles. In so doing its views not only gained in scientific value, but also proved to be of importance to the development of Catholic political science as a whole, affording an encouraging contribution to the discussions on democratic and authoritarian government in the period 1934-1938.

There is no doubt that the leading spirit of the Viennese School was the distinguished scholar, Hans Karl Zessner, Freiherr von Spitzenberg, who laid the foundation for its particular conception. It was his influence which made the individual scientific efforts of his followers find their synthesis in the School and enabled them to discover a method of developing the doctrine of legitimacy. Among the followers of Zessner-Spitzenberg[189] must be mentioned Anton Pichler,[190] Friedrich Ritter von Wiesner,[191] Alfred Missong,[192]

[188] A short but very interesting survey of political legitimism in Austria may be found in Friedrich Wiesner, "Zur Geschichte der legitimistischen Bewegung"—*Festschrift der Österreichischen Akademischen Blätter* (1936), pp. 51 seq. Cf. for Hungary *Der Legitismus in Ungarn, in Volk und Reich* XII, 567 seq.

[189] *Legitimität und Legalität* (1927); *idem, Der Rechtslehrer und das Wesen des Rechts* (1932); *idem,* "Legitimismus und katholische Gesellschaftslehre" —*Österreichische Akademische Blätter, OAB* (1935), pp. 4 seq.

[190] Anton Pichler, *op. cit.*

[191] "Ist der Legitimismus staatsgefährlich?"—*OAB* (1935), pp. 2-4. Wiesner was chiefly responsible for the introduction of the doctrine of the School into the political field.

[192] "Das Legitimitätsprinzip in Staat und Kirche"—*OAB* (1938), pp. 111 seq.

Thomas Michels, O.S.B.,[193] Victor Frankl,[194] and the writer.[195] The Viennese School was able to develop a doctrine no longer fettered to any particular issue of political science but leading rather to the general and eternal principles of a Catholic philosophy of law.

To have outlined this way was one of the chief merits of Zessner-Spitzenberg, who was the first to show that legitimacy is a universal principle of law, not restricted to particular legal problems, especially not to those of political science. In other words, legitimacy is a principle of law itself. This meant, further, that the question of the legitimacy of any given constitution can not furnish the starting point for a general inquiry into the principles of legitimacy, but rather that they must be found among the eternal principles of law.

Anton Pichler was the first disciple of Zessner-Spitzenberg to follow his doctrines. Their findings lead to much the same results, although they start from different points. Pichler, as a theologian, deals with the problem of legitimacy from the standpoint of Catholic moral theology. Zessner-Spitzenberg discusses it with regard to philosophy of law. Both take the existence of a universal principle of legitimacy for granted. They also accept the idea that this principle is a basic demand of morality. It is not exclusively linked to the problems of political science. It is therefore expressive of more than a mere dynastic right. It is not a notion restricted to the field of constitutional law *only*, but rather a universal legal principle which is applied to constitutional as well as to all other kinds of law. By enlarging the basic scope of the idea of legitimacy, these scholars enabled it to regain vigor. In this enlarged sense, it is a truly modern tenet.

Both Zessner-Spitzenberg and Pichler hold that every legal order must derive from Divine authority, i. e., must be in conformity with the Natural Law. The eternal law and the commandments as

[193] *Das Heilswerk der Kirche* (1935); *idem*, "Legitime und illegitime Herrschaft"—*OAB* (1938), pp. 108 seq.

[194] "Legitimismus, Faschismus, Demokratismus"—*OAB* (1936), pp. 35 seq.; *idem*, "Legitimitätsprinzip und Führerprinzip im Lichte des katholischen Gedankens"—*OAB* (1937), pp. 121 seq.; *idem*, "Die unveräusserlichen Rechte des Königs und der Arbeiter"—*OAB* (1938), pp. 73 seq.

[195] W. Plöchl, "Legitimität im Kirchenrecht"—*OAB* (1936), pp. 65 seq.; *idem, Das Legitimitätsproblem und das kanonische Recht* (1938); *idem, Kerkelijk recht en christelijke wereldbeschouwing* (1939).

stated in the Decalogue can not be abolished.[196] A distinction between their force in private and public law which would permit the belief that they are not valid in *ius publicum* would mean a lapse into Machiavelism. Pichler discusses the relations between the problem of legitimacy and the Decalogue in a special chapter.[197] More detailed consideration is given to two commandments, the fourth and the seventh. The fourth requires obedience to authority and attributes competence to the holder of authority to exact it.[198] Since Pichler considers the rightful possessor of the authority of the state as its owner, he is justified in applying the seventh commandment also to the problem. He says that the monarch "seine Gewalt, wenn auch zum Nutzen der Gesamtheit, so doch kraft eigenen Rechtes ausübt, wenigstens nach der allgemeinen katholischen Staatsauffassung. Er kann daher nicht als blosser Beamter angesehen werden, so dass wir doch wieder genötigt sind, ihn als Eigentümer der Staatsgewalt, wenn auch mit sozialen Verpflichtungen, anzuerkennen".[199]

Dealing with the question of governmental power, he touches two principal problems of legitimacy: "Wann ist die Herrschaft eines Menschen über andere zur Regelung der gesellschaftlichen Tätigkeit des Menschen rechtmässig? und: Wie muss sich ein Katholik gegenüber der Gewalt nach Massgabe ihrer Rechtmässigkeit verhalten?"[200] It is certain that authority, including the authority of the state, originates from God. But it is essential that the distinction be made between the authority of the state as such and its holder. It is impossible, therefore, to argue conclusively from the moral competence of governmental authority as such to the moral competence of him who seized it. Discussing the possible means of original acquisition of governmental authority and the various theories referring to them, he supports his own views with the contention that "wer immer qualifiziert ist zum Bau eines Staates, sei es ein einzelner, seien es viele, seien es alle Glieder des künftigen Staates, hat durch die Natur Recht und Pflicht, Schöpfer eines Staates zu werden. Durch den Schöpfungsakt erlangt der Schöpfer

196 Pichler, *op. cit.*, V, 20 seq.; Zessner-Spitzenberg, *Legitimität und Legalität*, pp. 165 seq.

197 Pichler, *ibid.*, pp. 27 seq.

198 Leo, H. E. II, 211 seq.; Alloc. I, 213 seq.

199 This is to be said, generally speaking, of any legitimate chief executive, no matter what the form of government.

200 *Ibid.*, p. 31.

den Rechtstitel auf die Staatsgewalt". This theory combines, in his opinion, the so-called patriarchal theory, Haller's theory of the *ius privatum*, and the Catholic doctrine of the sovereignty of the people.[201]

He lists among the derivative titles for the legitimate acquisition of governmental authority: succession by inheritance in conformity with the demands of the constitution, bestowal of the power by the people, cessation of the power of the legitimate executive because of the violation of stipulations or by resignation. However, according to Pichler, the legitimacy of an administration does not cease to exist following a single abuse of authority, although such an act must, of course, be considered illegitimate. On the other hand, the illegitimate deposition of a government by the people is an act of revolution and is followed by no creative constitutional results.

Pichler eventually enumerates the possibilities for the convalidation of an illegitimate authority.[202] One possibility is the death or voluntary resignation of the former rightful holder of authority. Legitimation takes effect *eo ipso* for no other right exists which could oppose it. It is, therefore, essentially the same procedure as an original establishing of an authority. From the moment of the rightful executive's death the illegitimate ruler becomes legitimate. But this is not identical with a *fait accompli* to which, referring to Pius XI, Pichler denies the power of legitimation.

He discusses also Tischleder's doctrine of the "creative principle of the common weal", which he rejects relying on Catholic moral teaching.[203] The limits of the common weal must be traced very carefully: a thing can be morally good only if it complies with the demands of the common weal in relation to God, to one's self, and to one's fellow man. In other words: "nicht das Gemeinwohl an und für sich kann oberstes schöpferisches Prinzip der Sittlichkeit sein, sondern . . . nur ein richtig geordnetes, d.h. nach dem Dekalog geordnetes Gemeinwohl[204] . . . Wir dürfen nicht nach der Nützlichkeit für das Gemeinwohl fragen, sondern nach der Sittlichkeit, und dieses Prinzip spricht für die Wahrung alter rechtmässiger Ansprüche".[205] If usefulness is to rank higher than morality, then

[201] *Ibid.*, p. 93.

[202] *Ibid.*, pp. 105 seq.

[203] *Ibid.*, p. 108.

[204] Cf. Cathrein, *Moralphilosophie*, I, 290 seq.

[205] Pichler, *ibid.*, p. 285.

the principle of the common weal will be destroyed. For: "Das Gemeinwohl selbst verlangt rechtmässige Zustände, denn es muss sittlich orientiert sein. Es gibt kein richtig geordnetes Gemeinwohl, als Zustände, welche sittlich geordnet sind. Durch dieses Verlangen nach Herstellung sittlich rechtmässiger Zustände ist das Allgemeinwohl ein konservativ erhaltendes Element, während es zu einen revolutionären Element schlimmster Art würde, wollte man das Gemeinwohl selbst zum *Rechte* schaffenden Prinzip erheben." Neither the consent of the people nor prescription by the lapse of time are basic grounds for legitimation, but only the impossibility of restoring the legitimate authority. But even in the latter case, the true legal ground is the same as in the case of the creation of a new state. He concedes as a further ground of legitimation, however, the voluntary resignation of the legitimate holder of authority.

As far as the obligations of Catholics toward legitimate authority are concerned, Pichler maintains that they are contained in the Decalogue: they are, generaly, speaking, obedience, respect, and loyalty. These same obligations, furthermore, impose upon the Catholic the burden of upholding the rights of the legitimate ruler against an usurper. But the citizen, on his part, has the right to active resistance and legitimate self-defense against illegitimate acts of even the legitimate ruler. Pichler, however, recognizes duties toward the victorious usurper—as a result of the theory distinguishing between the authority and the holder of it. Conforming to Zessner-Spitzenberg, he terms this holder "legal" instead of "legitimate".[206] But besides the duties to the latter, there remain duties also toward the "pretender to the legitimate authority" because the latter has not lost his *ius ad rem* by the illegitimate deposition, among which is that of reconciliation.[207] Any ruler, or his legal successors, and the commonwealth whose common weal has been violated by the loss of the legitimacy of rulership, has the right to demand reconciliation. We shall refrain from discussing the many other obligations indicated. Suffice it to say that he eventually points out that these obligations evidently cease to exist when the claims to legitimacy of the former holder of the authority are extinct.[208]

Zessner-Spitzenberg, whose doctrine is unsurpassed in clearness and depth of thought commences his discussion with the sentence:

[206] *Legitimität und Legalität*, p. 170.

[207] Pichler, *ibid.*, p. 138.

[208] *Ibid.*, p. 144.

"Auch die öffentlichen Gewalten und die öffentlichen Rechtsordnungen unterliegen im wesentlichen denselben Moralgrundsätzen und stehen im Rahmen derselben göttlichen Weltordnung wie die privaten Rechte, Befugnisse und Gewalten".[209] What has been said at the beginning of our discussion of the theories of the Viennese School, namely that legitimacy is a legal principle which applies universally but *also*, of course, to political science, is emphasized by Zessner-Spitzenberg when he holds[210] that rightfulness of acquisition is esential to every legal possession. This rightfulness or legitimacy consists in the fact that " der Erwerb ohne noch nachempfundene, nachweisbare Verletzung eines besseren Rechtes vor sich ging ". There is no reason why the principles of the seventh commandment should be applied only to private laws and not to the holding of public authority. For—according to Zessner-Spitzenberg —the fourth commandment and the seventh are interrelated, and the former qualifies and, in turn, is qualified by the latter. He enumerates the following ways in which governmental authority may be rightfully acquired:[211] the development and extension of the paternal authority of a patriarch[212] into governmental authority; acquisition in virtue of valor, wisdom, affluence, election, treaty or appointment under higher authority; the settlement of a society in new territory;[213] and finally necessity in an emergency in which legitimate authority has ceased to exist and no succession has been provided for. All these ways are sources of original titles. A derivative title is one that arises under a prearranged order for personal or formal continuation of the original. But it should not be forgotten that these rules of acquisition and transmission of authority do not affect the authority as such. They only determine who may rightfully acquire it. The true transition of the authority itself is contained in and completed by a voluntary act of the designated person. This is one of the distinguishing features in Zessner-Spitzenberg's doctrine. Authority needs not only to be conferred, but in order that the act of succession be complete, it needs also ac-

[209] *Legitimität und Legalität*, p. 166.

[210] *Loc. cit.*

[211] *Op. cit.*, pp. 167 seq.

[212] E. g., the head of a tribe.

[213] Here he expressly mentions the settlement of the Pilgrims at Plymouth Rock.

ceptance.[214] But it is essential that the legitimacy of the act be controlled in the norms of appointment and succession and not subject to the will of the person acquiring authority.[215]

He insists, moreover, that a clear distinction must be made between facts and their legitimacy. " Es sind demgemäss die aus bloss äusserer Tatsächlichkeit fliessenden sittlichen Folgen und Rechte und deren relativer Schutz nicht zu verwechseln mit den sittlichen und rechtlichen Folgen des auch innerlich Rechtmässigen und mit dessen vielfach absolutem Schutz ".[216] Moral consequences of the facts themselves must be distinguished from the moral claims of a legitimate competency based upon rightfully acquired status. Thus the possessor of stolen goods is protected against a third person who has no right to them. The possessor, too, has rights and duties originating from the (illegal) possession so far as relations with third persons result from it. "Auch die durch Frevel und Ehebruch begründete Vaterschaft und Mutterschaft hat ihre tatsächlichen und sittlichen Folgen, gewährt Anrecht auf Gehorsam und Unterordnung des Kindes und begründet Pflichten gegen dieses . . ." Zessner-Spitzenberg then asks why an exception to these moral rules should be thought applicable where the possession of supreme power is concerned? It is not sufficient answer to invoke the common weal and public order, for this would mean, " Zweck und bloss naturgemässe Zweckerfüllung im Falle der öffentlichen Gewaltträgerschaft auch als zweckanstrebende Mittel heiligen lassen, beziehungsweise anneh-

[214] This voluntary acceptance is also one of the basic principles of the American constitutional system. It is expressed in the oath which the person elected or appointed must take.

[215] *Op. cit.* (p. 168 seq.). " So wird also die Staatsgewalt im Wesentlichen *ergriffen* und dann von *Personen* getragen und geübt. Sie wird—beides—ergriffen und geübt zu *Recht* oder zu *Unrecht*. Ergreifen und üben bleibt unter dem Sittengesetz von Recht und Unrecht. Das ist der wesentlichste Punkt im katholisch fundierten Legitimismus. Hier wird kein Unrecht in seinem Dauerzustand . . . dadurch zu Recht legitimiert, dass die unpersönliche Volksgemeinschaft nach dem Rechtsbruch einfach die ihr zugefallene Staatsgewalt auf neue Organe (meist die Menschen selbst) überträgt.—Das Unrecht der *gelungenen* Revolution somit sofort zum Recht sanierend. Hier flüchtet sich nicht jede Usurpation hinter angeblich göttlichen Willen, der oft nur Zulassung ist. Hier tritt schon bei Ergreifen und Ableiten der Staatsgewalt der persönliche Gewissensträger verantwortlich in den Vordergrund, mit *seiner* Gewissenspflicht auch jene aller seiner Anhänger."—*Legitimismus und katholische Gesellschaftslehre*, p. 5.

[216] *Legitimität und Legalität*, p. 169.

men, dass Unsittlichkeitsfolgen illegitimer Gewaltergreifung dadurch annulliert werden". If this were adequate reason for legitimation then the thrifty thief would have to be protected from the wasteful owner.

Zessner-Spitzenberg applies two distinctive legal terms to the two distinct concepts based on facts in themselves and on their rightfulness, namely, "legality" and "legitimacy". The authority of a government is "legal", for example, if it has actually succeeded in exercising (unlawfully seized) authority, while authority is "legitimate" if rightfully acquired. The legal (actual) holder of governmental authority may impose obligations because this authority receives its power from the only possible source, God. But this distinction must be borne in mind; it is the authority that is sacred, not its usurper. The consequence is, of course, that the subject is under a moral obligation to obey orders given by the "legal" holder so far as they are based upon the eternal principles of authority. Thus Zessner-Spitzenberg opposes very strongly the deterioration of the doctrine of legitimacy brought about by the merely formal legitimism which refuses to recognize any authority except the one which claims to be legitimate.[217]

Zessner-Spitzenberg's concept does not diminish the force of the claim of the deposed legitimate holder. Usurpation is a grave violation of law, an injustice, which can not be blotted out merely by success. Thus the consequence is "dass das Recht der legitimen Staatsautorität durch tatsächliche Verdrängung allein nicht aufgehoben und beseitigt wird, sondern lediglich *ruht* . . . [und] dass das geschehene Unrecht wie jedes Unrecht nach Sühne und Wiedergutmachung ruft".[218] It is interesting to note that he rejects the notion of prescription as a means of legitimation of governmental authority by advancing the contention that prescription is a merely positivistic institution.[219] As long as there are no internationally recognized courts and no recognized international law, there can be no prescription of legitimate claims. He recognizes, however, that the superseded legitimate claim can *de facto* become impossible of fufillment.

[217] *Op. cit.*, p. 173.

[218] *Op. cit.*, p. 174; cf. a similar view in J. Held, *Legitimität*, p. 38 (he speaks of suspension).

[219] *Op. cit.*, pp. 176 seq.

Injustice perpetrated demands restitution. Zessner-Spitzenberg, therefore, indicates that there is an obligation of restoring the legitimate order. This obligation rests first with the usurper and his successors.[220] But it is also an obligation of the governed, because justice is the common concern of mankind and redounds to the common good.

VI. The Problem of Legitimacy

It was with a special purpose that we have devoted a great part of this discussion to the teaching of Catholic scholars. We have tried, however, to trace the whole philosophical development of more than a century revolving about this doctrine. Surrounding this picture we have drawn, and whose outlines we have purposely taken word for word from the most important sources, there revolved great events of political history. At the beginning of our study we met De Bonald's and De Maistre's discussions based on the events of the French Revolution and the Napoleonic wars; at its end we found the doctrine of Zessner-Spitzenberg whose work was brought to a sudden end by another ruthless violation of the eternal principles of law, justice and charity, and who lost his life as a sacrifice to the ideals in whose interests he fought.[221]

Through Traditionalism, Romanticism, Historism, Positivism, and many other past and present " isms ", the progress of our problem can be followed. Many solutions and arguments proposed can hardly survive criticism. But this was not our task. We did not refer to the various theories of political science for purposes of criticism, but to aid ourselves in the search for the general concept governing the problem of legitimacy. The theories reviewed here have shown us various doctrines of legal philosophy which have dealt with it, stretching from a rigid concept of formal legitimacy to the complete denial of the existence of the principle as such.

Thus we have still to face the question: which conception of legal philosophy offers the true solution of our problem? This immediately suggests another related question: which are the general principles of legitimacy as such, regardless of special points of view like that of political science?

220 *Op. cit.*, pp. 180 seq.

221 Zessner-Spitzenberg died in the concentration camp of Dachau, Bavaria, August 1, 1938, as a victim of the forced occupation of Austria by Germany.

To begin with the first question, we believe that the concept of legitimacy can be truly understood if based upon a general philosophical doctrine recognizing the existence of God. Translating this into terms of legal science, it means the recognition of an order of norms emanating from God: Natural Law.[222] By adopting this fundamental doctrine we establish the basis of every other deduction.

As to the second question, several rules obtain. According to an increasingly important Catholic doctrine, law[223] is an integral part of the moral order. From this there results the necessity of accord between law and morals. The recognition of this interdependence is essentially basic to the understanding of our problem. Legitimacy is a question not only of law, but necessarily also of morals. If morality were entirely excluded from legal considerations, then it might be possible to assume that legitimacy has no place among legal concepts or, to proceed a step further, offers no argument in jurisprudence. But the adoption of such a concept entails the risk of approaching the *fait accompli* as a recognized source of law or, more bluntly speaking, of admitting that force is law, that might is right. But if we adhere to the tenet that we have already adopted as the basis of our ideas, namely, that law and morals are essentially interrelated, we are prepared to call upon the aid of a system of jurisprudence in which that relation is emphasized and

[222] Cf. among the more recent works: J. Barion, "Zum Problem d. Nat. Recht"—*Theologie und Glaube* (1935), pp. 174 seq.; J. Moor, "Das Problem d. Nat. Recht"—*Archiv für Rechts- und Wirtschaftsphilosophie,* XXVIII, 416 seq.; D. Draghicesco, "Philosophie du Droit et Droit naturel"—*Archives de philosophie du droit* (1935), pp. 243 seq.; J. Schwering, "Das natürliche Recht und die Rechtsphilosophie der Gegenwart"—*Stimmen der Zeit* (1936), pp. 153 seq.; C. Esposito, "La conoscenza della legge nel diritto e nella morale"—*Revista intern. di filosofia del diritto* (1935), pp. 407 seq.; H. Weber, *Gustav Hugo. Vom Naturrecht zur historischen Schule* (1935); H. Rommen, *Die ewige Wiederkehr des Naturrechts* (1936); F. X. Arnold, *Zur Frage des Naturrechts bei Martin Luther* (1937); A. Grobmann, *Das Naturrecht bei Luther und Calvin* (1935); M. Mikorey, "Naturgesetz und Staatsgesetz"—*Zeitschrift der Akademie für deutsches Recht* (1936), pp. 932 seq.; L. Peña, "Essai critique sur les notions de Loi Eternelle et de Loi Naturelle"—*Archives de philosophie du droit* (1936), pp. 92 seq.; A. D. Frenay, "The natural law"—*Ecclesiastical Review* (1937), p. 1 seq.; R. Pound, *Law and Morals* (2. ed., 1926).

[223] J. Haring, *Der Rechts- und Gesetzesbegriff in der katholischen Ethik und modernen Jurisprudenz* (1899), pp. 20 seq.; H. Nef, *Recht und Moral in der deutschen Rechtsphilosophie seit Kant* (1937).

in which may be found the best developed application of the principle of legitimacy. Such a system is that of Canon Law, for the number of canonists who have participated in the discussion of that problem have insured its relatively thorough analysis.[224]

The general axiom of supreme importance, is, then, that law must be in conformity with the Divine moral order. What has been said as representing Zessner-Spitzenberg's and Pichler's deductions as to the obligations implied in the fourth and the seventh commandments of the Decalogue must be held to be true in every regard. Legitimate law can exist only within the limits of the Divine moral order.[225]

The second axiom is that legitimate law must emanate from the rightful legislator and may not unlawfully derogate the (legitimate) right of anybody else. The limits for these mutual obligations are those established by the Divine, the Natural, and human law.[226] If we regard legitimacy in this way, we shall clearly understand that it is not merely a problem of the constitutional laws of succession of a ruling dynasty. Not only are there many other legitimate rights, but there has to be legitimacy throughout the entire legal order. The rights the Church needs to fulfill its purpose are just as legitimate as those of parents to educate and guide their children, or of every human being to life, work, and a just wage.[227] They are "certain unalienable Rights", as says the Declaration of Independence, "to which the Laws of Nature and of Nature's God entitle" mankind.[228]

The third basic rule is the denial that the violation of law can act as a creative legal force in itself; or, speaking in the affirmative: the acceptance of the principle of strict legal succession understood in its most general sense. The violation of legitimacy is, therefore,

[224] W. Plöchl, *Legitimitätsproblem und das kanonische Recht,* pp. 41 seq. Cf. *supra,* p. 85.

[225] W. Plöchl, *op. cit.,* pp. 49 seq.

[226] W. Plöchl, *op. cit.,* pp. 61 seq.

[227] V. Frankl, *Die unveräusserlichen Rechte,* pp. 74 seq.

[228] It might be interesting to note that the concept of "unalienable Rights" was no original notion of the French or German legitimism of the nineteenth century—see G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (3. ed., 1919), pp. 39 seq. It was later adopted by certain schools, but mostly reduced to the concept of "unalienable Rights of the monarch". See Gaudu, *op. cit.,* pp. 700 seq., and V. Frankl, *op. cit.,* p. 74.

a very important phase of our subject.[229] It is possible in three principal ways: the violation of legal forms; the infringement of another's competency by the legislator or an executive; and usurpation of authority by the expulsion of the legitimate holder. As to infringement of another's competency, this can occur either when one unrightfully infringes upon the legal sphere of another[230] or when, without due competence, he issues laws. Such infringement is a violation of legitimacy not only when committed contrary to human law, but also if contrary to Divine or Natural law. As to usurpation, it may be restricted to a certain office, or extend to the supreme power. In the latter case we are confronted—so far as the terms of political science are concerned—with illicit revolution.[231]

The discussion of the ways in which violation of legitimacy may occur leads to another problem. There is no doubt that there can be only *one* legitimacy. Nevertheless two aspects of legitimacy may be distinguished: the material or internal legitimacy and the formal or external legitimacy, the latter no less important than the former. If we accept—as we do—the principle that human law must be in conformity with Natural Law and moral order, we postulate what we may call the material or internal legitimacy.[232] It means that human law must conform to the eternal principles discussed above. Formal or external legitimacy requires that law must emanate from the (legitimate) legislator in rightful form. Thus rules of competency and of form must be observed. This is a maxim familiar, of course, to every well organized legal order. But, except when thinking in terms of merely the positive law, this distinction is of first rate importance., for "formal" legitimacy alone can not suffice. Conformity with the eternal principles is the first and essential requirement.[233] External legitimacy may be dispensed with, but no true law can exist which lacks conformity with the rules of the natural order or, in our words, which lacks internal or material

[229] E. v. Hippel, *Untersuchungen zum Problem des fehlerhaften Staatsaktes* (1934); K. Korman, "Grunzüge eines allgemeinen Teils des öffentlichen Rechts"—*Annalen des Deutschen Reiches (1911 und 1912)*.

[230] For example, by depriving subjects of constitutional or natural rights.

[231] For example, usurpation of Church offices—see W. Plöchl, *op. cit.*, pp. 51 seq.

[232] W. Plöchl, *op. cit.*, pp. 50 seq.

[233] Michels, *Heilswerk; idem, Legitime und illegitime Herrschaft*, p. 108.

legitimacy.[234] The more desirable situation, of course, is a full accord between internal and external legitimacy.

One of the usually more difficult problems arising out of violation of legitimacy is that of legitimation, or the sanation of a violation of law. We must state first that every violation of a legal order is a more or less grave offense and, therefore, implies guilt. This is expressed most clearly in penal laws, but evidently it is implicit in the entire system of any order of norms. The guilt is graver, the greater the violation of the order of morals and of Natural Law. It results primarily in an obligation of atonement, which rests first of all on the violator and his accomplices, and secondarily on all those who gained any advantage from the commission of the unjust act. In a wider sense, it is incumbent upon all whose power or influence enables them at least to participate in the restoration of the violated order, even if they were not guilty, directly or indirectly, in the original violation. They are bound thus because, besides the personal reconciliation of the guilty there is involved the correction of the harm that has been done the injured one. Moreover, the injured one has the right to insist upon the restoration of his right, employing every permissible means. But he may not accomplish it by another violation.[235] Restoration may become sometimes impossible.

As the murdered father can not be revived for the sake of his children, rights and titles may be destroyed beyond redemption. But this does not abolish the obligation of atonement, not even when there is no human power that can enforce it. The loss may be irreparable. Certainly, the more highly organized the legal order is that has been violated, the more complicated would sanation of the violation become. It is no secret that the present form of constitutional and international law may render restitution impossible precisely in the cases where violations arising in those fields are most flagrant and harmful. But do such difficulties excuse from the obligation of restitution which is recognized in other provinces of law?

[234] At this point our theory comes close to Zessner-Spitzenberg's conception of the "legal" and the "legitimate" order: the "legal" order is of obligation so far as it is based upon the natural order. But these two problems should not be confused: even the most legitimate monarch or president can act illegitimately by decreeing norms violating natural law (lacking material legitimacy), although such decrees might be formally in absolute accordance with constitutional procedure. This problem is even more interesting in Canon law; see W. Plöchl, *op. cit.*, pp. 49 seq.

[235] E. g., by a vendetta.

Zessner-Spitzenberg has indicated a way to a solution of the schism between the "legal" and the "legitimate" order. We, too, should indicate the order to which restitution should be applied. The authority of the state which originates from God, imposing under Natural Law the obligation of obedience even towards the usurper within the scope of the rights and duties required by Natural Law, this needs no legitimation, if only a state exists at all. But what must be legitimated is the unlawful seizure and the illegitimate retention of power by the usurper.

As stated above, the injured one has a right to restitution. He has the further right to offer resistance within the limits of Natural Law. But he may not attempt the recovery of his right by means of illicit actions. He must await a favorable opportunity for the licit assertion of his claim. Emergency rights and rights of resistance are limited by these principles.[236]

Besides restitution in the manner already indicated, sanation of a violation of legitimate rights or a legitimate order may be undertaken by a superior authority. Canon Law is the outstanding protector of legitimacy through its strict system providing for and re-

[236] St. Thomas Aquinas (*Summa Theologica,* 2, 2, qu. 42, art. 2, ad 3um: Utrum seditio sit semper peccatum mortale?): "Ad tertium dicendum, quod regimen tyrannicum non est justum, quia non ordinatur ad bonum commune, sed ad bonum privatum regis . . . et ideo perturbatio hujus regiminis non habet rationem seditionis, nisi forte quando sic inordinate perturbatur tyranni regimen, quod multitudo subjecta majus detrimentum patitur ex perturbatione consequenti quam ex tyranni regimine". The notion of legal resistance depends upon the province of the law concerned, for instance the legal defense in penal law. We are dealing only with the right of resistance to incompetent acts of governmental authority. See Albrecht, *op. cit.,* pp. 73 seq.; Meyer, *op. cit.,* pp. 233 seq.; H. Fehr, "Widerstandsrecht"—*Mitteilungen des Institutes für Österreichische Geschichtsforschung,* XXXVIII (1920); Gentz, "Die Frage der Rechtmässigkeit der Revolution ist die erste und letzte"—*Hist. Journal,* II, 2. part, pp. 48 seq.; Merkl, *Staatsgewalt,* pp. 13 seq.; Vincent-Charles Bertolini, *La légitime défense dans la doctrine du droit musulman en Egypte* . . . (1931), especially Chapter IV, "Les actes illégaux et abusifs de l'autorité" (pp. 104-126); Ferrero (*The principles of power,* p. 66): "The American colonies are not revolting because the principles of legitimacy of the Old Regime are contrary to reason and justice, but because the government has ruled badly." The historic example is not the French but the American Revolution whose philosophy aimed at the restoration of the (legitimate) inalienable rights of mankind. Cf. C. H. Becker, *The Declaration of Independence* (2. ed., 1942).

quiring the sanation of legally doubtful acts.[237] But no matter by whom sanation is granted, it can take place only within the limits of Natural Law: this we must maintain.[238] As far as human law is concerned, the authority competent to grant it must act within the limits of his power. The authority must, therefore, be itself legitimate and the act must be within its competence and be in itself such as is adequate to the sanation of the violation. It may also require certain compensatory acts of the violator.[239] When supreme authority has been violated, the question of legitimation is more difficult, inasmuch as there may be no other authority competent to act. But it is a paralogism to deduce from this that where no actual legitimation can take place, legitimacy as such can not exist at all.[240] In this case as in all others, accord between the demands of Natural Law and human law must be the supreme rule. A simple reference to the common weal without such an accord can not lead—at least in our opinion—toward legitimation. Canon Law certainly strictly excludes such a possibility.[241]

It depends on the organization of a legal order to determine to what extent a proper legitimation can be replaced by legal surrogates. Such a determination also touches the problem of legal assignment.[242] It is impossible, therefore, to establish general guiding principles on the question of prescription. Generally speaking,

237 W. Plöchl, *op. cit.*, pp. 61 seq.

238 As to *dispensatio contra ius naturale*, see: Haring, *Rechts- und Gesetzesbegriff*, pp. 34 seq.; as to "epikeia", see Plöchl, *op. cit.*, pp. 58 seq. The attitude of Catholic teaching denies both.

239 E. g., *legitimatio per subsequens matrimonium*—McDevitt, *loc. cit.*

240 The history of the Papacy shows that usurpation of even this authority has been attempted; cf. Plöchl, *op. cit.*, pp. 46 seq. (with bibliography). On the other hand, in times when the Papal authority was also recognized as being the highest secular authority, it acted as the supreme legitimator or as the supreme judge to denounce pretended legitimacy; see F. Kern, *Gottesgnadentum und Widerstandrecht im früheren Mittelalter* (1915), p. 298; K. H. Ganahl, *Studien zur Geschichte des kirchlichen Verfassungsrechts im 10. und 11. Jahrhundert* (1935); K. Voigt, *Staat und Kirche von Konstantin dem Grossen bis zum Ende der Karolingerzeit* (1936), pp. 445 seq.; as to Papal authority: K. Hofmann, *Der "Dictatus Papae" Gregors VII* (1933); as to the notion, "Dei gratia": H. Borch, *Das Gottesgnadentum* (1934).

241 W. Plöchl, *op. cit.*, pp. 61 seq.

242 E. g., in Canon law prescription can not be applied to invalid ordination; see Plöchl, *op. cit.*, pp. 54 seq.

one may say that all arguments basing legitimation on prescription, on the obliteration of better rights, and on other similar expedients, can have the value of valid arguments only if the legal order concerned recognizes them as such.[243]

Thus we hope to have discussed the most important elements of the problem of legitimacy. " C'est un grand et profond mot que celui de la légitimité, mais que de nuages authour de lui . . . ", wrote De Pradt, a contemporary of the Congress of Vienna, in 1815.[244] We think that this observation has not ceased to be valid. Indeed, it is a grand and profound notion which is contained in the problem of legitimacy, one that we can not grasp unless we take the principles of " moral jurisprudence " as our starting point.[245]

Erwin Albrecht—to recall the matter again—is right when he holds that legitimacy can not be disproved as it belongs as a fundamental element to religious creed.[246] It seems, therefore, to be an antithesis when Ferrero states in a final analysis: " We can no longer have any illusions on the nature of the principles of legitimacy: they are human, that is, empirical, conventional, extremely unstable. Any philosophical hack can demonstrate their absurdity; any dictator, at the head of a gang of cutthroats, can suppress them. Nevertheless, they are the condition of the greatest good that mankind as a collective being can possess—government without fear ".[247] It is a strange antithesis. Albrecht ascribes legitimacy to the sphere of religion to exclude it from his own doctrine with the sole purpose of justifying the revolution of the " new order ", while Ferrero eliminates any religious idea from the concept to aid in the restoration of another " order " after the defeat of the opposed " new " one.

Perhaps as contemporaries of this new world-wide revolution we shall better understand the problems which the European statesmen in Vienna, more than a century ago, tried with great skill and earnest effort to solve. In that other era of " post-war reconstruction " the fundamental effort was—unquestionably—the restoration of justice and order so as to maintain European peace, a restoration

[243] As to prescription as an argument of legitimation, see Brockhaus, *op. cit.*, pp. 239 seq.; Brie, *op. cit.*, pp. 37 seq.

[244] De Pradt, *Du Congrès de Vienne*, II (1815), 74.

[245] E. Hölscher, *Sittliche Rechtslehre*, 2 vol. (1929).

[246] *Op. cit.*, p. 122.

[247] *The principles of power* (1942), pp. 313, 314.

which was to be promoted and guaranteed by the religiously inspired idea of the Holy Alliance. It was mainly due to the failure of the religious restoration that the achievements of 1815 were nullified.

There is no doubt that the destruction wrought today far surpasses that of the past century.[248] A great part of the world has seen not only its political order annihilated but also a destruction that reaches far into the spheres of Divine and human rights. In 1859, the classic Austrian poet, Franz Grillparzer, dramatized the chaos to come in six single words:

> "Legitimacy, authority, nationality,—
> Absurdity, servility, bestiality".[249]

It is ours to experience this drama, constructed by ideologies which tried to replace eternal principles with a ruthless order of absurdity, servility, bestiality: "What used to appear on the outside as order, was nothing but an invasion of disorder: confusion in the principles of moral life. These principles, once divorced from the majesty of the Divine law, have tainted every field of human activity.[250]

But is it worth while to sacrifice the blood of even *one* man to restore the world upon principles of which "any philosophical hack can demonstrate their absurdity?" There is but one answer: "No". The principles without which the world can not be restored "must rest on the unshakeable foundation, on the solid rock of Natural Law and Divine Revelation." Through them alone the human legislator can attain to that balance, without which he may all too easily mistake the frontier between the legitimate use and the abuse of power.[251]

We need the restoration of Natural Law to its full dignity and value. It is the law which "is not the subjective creation of human thought. It has not been produced by this individual or that. It

248 J. Lelewel (*op. cit.*, p. 12) said a century ago (1837) of the legitimate struggle of Poland what can be said today of many nations: "Cest une légitimité pour laquelle les Polonais combattent sur leur propre sol, comme tant d'autres peuples qui marchent à la conquète de leur émancipation. Ils veulent la relever avec toutes autres qui lui appartiennent, telles que l'indépendance, l'integrité, la souveraineté du peuple et les principes de la démocratie."

249 Grillparzer's *Werke* (ed. St. Hock), part 2, p. 327.

250 Pope Pius XII, "*Summi Pontificatus*" (October 20, 1939)—*Acta Apostolicae Sedis*, XXXI (1939), 555.

251 "*Summi Pontificatus*"—*ibid.*, p. 556.

is a supreme reality, an innate need of human nature, an objective measure of necessary truth. No one can take it away: it is his privilege. No one can renounce it: it is his duty.".[252] There are legitimate rights embodied in our souls, which can be suppressed but not abolished. There will always survive the legitimate order comprising the rights of the individual and of the nations, of the heads of families and of the rulers of states. This order can not ultimately be overruled for its is the Divinely-sanctioned Natural Order.[253]

It is the task of today and tomorrow to restore this Natural Order.[254] This means the restoration of the justice and the charity, of the equality and the legitimacy for which the Creator has given us His eternal principles in every field of life: "Instaurare omnia in Christo".[255] It is a tremendous and heroic task, worthy of extreme sacrifice. We shall achieve it with the help of truth and charity, the "indispensable counsellors and aids to men of good will in the reconstruction of a new world based on justice and love, when mankind, weary from its course along the way of error, has tasted the bitter fruits of hate and violence".[256]

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[252] Amleto G. Cicognani, *Addresses and Sermons,* II (1942), 12.

[253] "*Summi Pontificatus*"—*op. cit.,* pp. 554, 555.

[254] See also: Five Conditions of a Just Peace—Christmas Message (1939) of Pope Pius XII; "Peace Points jointly adopted by all Churches in England"—*The Times* (London: December 21, 1940); William Temple, *Christianity and Social Order* (1942), p. 58.

[255] Ephesians, i, 10. This quotation is the keynote of the magnificent, and more than ever appropriate—Encyclical of Pope Pius X, "*E supremi apostolatus*" (October 4, 1903)—*Acta Sanctae Sedis,* XXXVI (1904), pp. 129 seq. Canonists may also recall the same Pope's motu proprio, "*Arduum sane*" (March 19, 1904)—*Acta Sanctae Sedis,* XXXVI (1904), inaugurating the codification of the *Codex Iuris Canonici*: ". . . praecipua Nobis mens fuit et quasi lex constituta, quantum sinerent vires, instaurare omnia in Christo." Cf. President Roosevelt to the Argentine Bishop Andrea (August 29, 1942): "The only aim, worthy of mankind that can compensate for its sorrows is the speedy and world-wide establishment of the Kingdom of Christ among men, not only in word but in spirit and fact."

[256] "*Summi pontificatus*"—*op. cit.,* p. 562.

Cases and Studies

THE JURIDICAL STATUS OF THE PARISHES OF RELIGIOUS: ANOTHER VIEW[1]

In The Jurist for October 1941 there was a scholarly article entitled: " The Juridical Status of the Parishes of Religious " written by the Reverend Jerome D. Hannan J.C.D. While it occasioned much favorable comment, in several circles there has arisen a respectful disagreement with some of the written conclusions. Through the kindness of the The Jurist it has now become possible to present another point of view on the same question.

The article by Doctor Hannan is important not only in its ideas but also in its implications. He wrote: " The whole tenor of the legislation of (the councils of) Baltimore indicates that the religious were only the administrators (of parishes) with the right to surrender the position on six months' notice. There was not sufficient permanence to constitute even a manual benefice. There was consequently no union of the parochial benefice to the religious community in the canonical sense." (page 333)

Apparently the conclusion is that the same status exists today. Such a striking statement is far-reaching and highly significant, because it indicates a little-suspected aspect of the relationship between a religious community and a diocese. The question is highly charged with dangerous potentialities, some of them most distressing to contemplate, and even though they seem to be only purely theoretical contingencies they might easily have very real and drastic effects.

This paper is submitted with the hope that more light will be thrown upon the question. It has been thought wise to separate the different features of the question and to discuss each summarily. No long quotations from the *Codex Iuris Canonici* have been inserted, though the canons have been cited in several places. Canonists will recognize citations, and they may have easy access to the *Codex* for verification or expansion. For bibliography the reader is directed to the sources used and indicated by Doctor Hannan. The present article is mainly a different viewpoint of the same matter, as drawn from those same sources.

[1] Cf. The Jurist, I (1941), 329-335.

I. Six Months' Notice

The II Council of Baltimore quoted both Boniface VIII and the I Provincial Council of Cincinnati, the former urging the stability of religious in their parishes, and the latter outlining the procedure for official notification whenever the religious are going to relinquish a parish. (Nn. 406, 407) The religious priests were reminded that they had to give the local bishop six months' notice of their intention to leave a parish.

Undoubtedly a powerful argument can be based on this idea of "six months' notice". If it is used as a key phrase, it could be developed so far that it would indicate all religious parishes were only seats of temporary occupancy.

But it must be remembered that it is also possible to twist this "six months' notice" into a meaning that is not in accord with the spirit of the whole legislation. This phrase can hardly be construed as an accentuation of the bishop's powers. If it does anything, it really stresses the wish of the Council to have the religious stay in the parishes where they were already serving. Such a term, from all indications, did not enter into any bilateral agreement between bishops and religious; neither did the religious insist that they were free to leave if they gave that much notce. The Council did not say, either, that the bishop could dismiss religious from a parish if he gave them such a notice. The Council was not delineating new powers for the bishops, but was rather protecting some of their rights. The whole worry was that religious would abandon places where they were needed or desired. To all intents and purposes, it was the bishops who desired the contracts to be perpetual. It was the stability of religious in parishes that was desired, not their transfer or their departure. The Council was intent on stressing the canonical wish of Boniface VIII ("that religious should not break their agreements with bishops . . ."), and that in every case where any religious assume the care of a parish, there is at least an implied contract present and understood. Such is only meet and just, and all canonists can heartily applaud these provisions.

The history of the Church in America does not reveal any mass migration of religious from their parishes in the Sixties or the Seventies. A check upon the list of parishes in the *Catholic Directory* shows that many of the religious-clergy parishes date far back beyond the Baltimore statute. Possibly there were local conditions in Cincinnati which occasioned this extraordinary legislation, but

it is doubtful whether there was any general movement among religious to discard their parishes. Likewise, the history of the growth of the Church in the United States during the second part of the 19th century indicates that prelates were anxious to have permanent helpers in their diocese, not merely birds-of-passage. Casual workers and temporary workers were not useful in the days when every boat from Europe dumped hundreds of Catholic immigrants on American soil. It was the stability of clergy that was sought, not merely the temporary assistance of priests who would be cautiously invited to spend a few years in the diocese.

The truth of the matter is that while practically all of the parishes in the United States managed by religious clergy are united *pleno iure* (canon 1425 § 2), some of them are assigned *in perpetuum* and others only *temporanee*. In both cases, the religious communities were cautioned by the Council to keep the agreements they had made with the local bishops. To state that *all* parishes are consigned *temporanee*, or to state that all parishes may be relinquished if six months' notice is given, is hardly true and correct, because many communities have explicit contracts, rightly signed and sealed and authorized, which indicate nothing less than a perpetual right and a perpetual duty to care for a parish in a diocese.

It is just as important to stress the word " agreements " in the canon of the II Council of Baltimore, as to accentuate the phrase " six months' notice ". In cases where the bishop and his consultors have rightly followed the Code in assigning a parish of the diocese to the care of religious priests, it is to the advantage of both parties to observe the terms of their mutual pact. Good public policy and sound canonical procedure would indicate the need of giving several months' notice before abandoning even a breakable agreement of such a kind; and if agreements had been made in perpetuity, even a six months' notice would be illegal and unsound. " Perpetual " contracts which may be voided by giving six months' notice furnish a shaky foundation for any stable organization.

If the distinction is made between temporary and perpetual contracts, immediately the full meaning of this " six months' notice " becomes apparent. Perpetual contracts are to last forever, or at least until some higher agency releases one or both parties; temporary contracts may be relinquished if six months' notice is given.

There is little utility in saying that all parishes held by religious communities have a transient and temporary status, when the obvi-

ous facts are that not only bishops *can* grant them parishes *in perpetuum*, but they *are* doing it even at the present time, just as they have in the past. *Ab esse ad posse valet illatio.* No prescript of the Code forbids it, and actually the terms of canon 1428 § 1 and canon 427 outline the way in which the legal transaction is to be executed. The bishop must ask the advice of his diocesan consultors in such a matter as this, and an indult must be asked from the Holy See for the full ratification of the contract.

II. Prescription

A religious community may have either a permanent or a temporary tenure in holding a parish. Such things are sometimes evident and certain, as the contracts between bishops and superiors show. There are times, however, when there is nothing more than "an implied contract" as the II Council said, and it is these latter things which have in the past often furnished ground for earnest and heated discussion.

If a bishop invited a religious community to undertake work in his diocese in the days of general immigration to America, and if he mentioned nothing about permanent tenure in their assigned parish, is prescription possible? May the peaceful and uninterrupted possession over a definite number of years be said to furnish the basis for a full and real title to its permanent possession? Doctor Hannan thinks not, but perhaps it is possible to take firm and reasonable exception to his opinion. In cases where no proper permission of the Holy See had been received for the holding of the parish in the first place, and in other cases where temporary status had been explicitly agreed upon by the two parties in the contract (i. e., bishop and religious), no prescription may be allowed, and most properly so. The law does not desire to work harm to good order, and such things would seemingly accomplish unhappy results.

But if proper authorization had been received from the Holy See at the time the parish was first occupied and if the religious had been invited to the diocese without any time-clause in the letters of reception, probably it is allowed to admit the view that *what is* can be taken for *what ought to be.*

Doctor Hannan holds the negative and opposite view. He also asks: "Would he (the bishop) have given the parish to the community if he knew that his act would later be frozen by an edict of the general law?" If it is allowed to answer such a question by

asking another, then here it is: "Would religious be prone to accept assignments so transient and ephemeral that they would always be uncertain and unstable, revocable *ad nutum episcopi?*" Possibly the non-legal reply to both questions is this: "It all depends." Depends on what? On the character of the work assigned them. On the nature of the invitation extended them. On the circumstances surrounding their call to the diocese. On the implicit promises made by the bishop when he called them to his assistance. On the general impression of priests and people concerning their rightful and lasting presence in the diocese.

Is it opposed to canons 1446 and 1509-2° to think that religious priests can benefit by prescription to acquire quiet possession of a parish that they had rightly accepted and long managed properly? Maybe yes, maybe no. Respectful differences of opinion may exist in the matter. But if the religious had obtained proper permission of the Holy See in the first place, then maybe there are grounds for believing that an affirmative answer can be correct. No violence is done to the rights of the Holy See (because an indult had been granted at the time of its first occupation), and there can be little violence in continuing a bishop-religious arrangement which has been presumed in the case to be calmly and properly observed. If the lack of Roman permission were the main obstacle to the course of such prescription, then it seems that the presence of a Roman indult paves the way for the ordinary course of prescription.

III. Permission of Holy See

The *Codex Iuris Canonici* in canon 452 § 1 insists that there must be an indult granted by the Holy See before a parish can validly be assigned to a religious community. Canon 1428 § 1 and canon 427 say that the bishop must hear the diocesan consultors on this matter, i. e., he must consult them, though he is not bound under Code law to follow their advice.

The Constitutions and Rules of many communities reflect the very sense and words of the Code. It is impossible to quote all or even many, but here are typical constitutions of one community of pontifical right:

N. 156 Paroeciarum directionem assumere nullo modo potest Congregatio, nisi praevie obtenta Sanctae Sedis venia.

N. 157 Provincialis ministerium huiusmodi pro nostris nequit assumere sine expressa Superioris generalis licentia, qui utrum id expediat una cum Consilio suo dijudicat et Sanctae Sedis indultum postulat.

N. 158 Stricte prohibetur cuique nostrum ambire munia paroecialia, aut ea sponte oblata accipere immediate ab episcopali auctoritate. Provincialis est episcopis proponere ex nostris eos qui huiusmodi muniis functuri sunt.

Many things become apparent from these typical statutes and rules. The first is that the acceptance of a parish is as important and serious for a religious community as is its assignment by a bishop. The agreement is bilateral, not unilateral. The second thing is that a community or a bishop would hardly be wise if either entered such an agreement or compact without clear understanding of all that the pact would imply and produce both in time and in relationship. In the crowded days of great immigration to America this may have been at times overlooked, but it would not be wise to imitate any casual policy today. One mistake is enough.

It is not exactly and conclusively clear whether the bishop or the religious community is to seek the indult from the Sacred Congregation of the Council, because instances are at hand which show that the bishop has made petition at one time, and the religious at another. Probably the best policy would be for the bishop to withhold his signature and his seal until the religious have asked and received the indult. That seems the proper order and the more feasible procedure. Copies of the contract are joined with authentic copies of the indult, as a rule, and both bishop and religious retain signed and sealed documents. Such a system is advisable, because it protects both parties to the compact. The Sacred Congregation of the Council is competent in matters of this kind, and ordinarily the Superior General of the community (or his procurator at the Holy See) will approach that august body for the requisite indult.

It would take a magnificent presumption to state that all communities have always acted rightly in such matters in the past; and it would take just the same presumption to state that all have acted wrongly, too. There may even be instances where no proper permission had been secured from the Holy See, because the community thought that the bishop was requesting the indult, and the bishop thought the community was doing it. Such misunderstandings could easily happen. Even Mary and Joseph made that mistake when they lost the Christ Child in Jerusalem.

The point to be made, however, is that all communities know this law, and it is being conscientiously fulfilled in these days. Religious

communities that are now undertaking work among the Negroes in the Southern States of this Union have not moved into parishes until both episcopal and Roman permissions have been granted.

It may be well to note here that even in cases where the bishops and religious have made a temporary contract (" for 100 years " or " so long as this parish is mainly Italian in stock " or " so long as this parish is mainly Negro "), permission of the Holy See must be acquired.

IV. Implied and Real Contracts

It would be highly desirable and advantageous if each community would present its documents of foundation, with the cold facts clearly embodied in black-and-white. Possibly many can, for they are not too remote in history to have all available papers and records. Written documents are not only legally necessary (" ne fiant nisi per authenticam scripturam "—canon 1428 § 1) but they are eminently satisfying.

Obviously the Fathers of the II Council of Baltimore knew of many situations where there was only " an implied contract ", and such could hardly be written. The Council did not say that implied contracts were no contracts at all, but rather it insisted on their reality, and it showed itself loath to release religious communities from the parish duties that such contracts had placed upon them. It was not right to desert a territory and to leave a parish unattended, and the Council bemoaned the fact as it reminded the anonymous and shadowy delinquents of their duties.

Is it possible to have an implicit contract that is perpetual? Why not? An invitation to a person's house for dinner does not include the right to stay forever, it is true, but the analogy is not that way at all. A general and broad invitation to a religious community to take up a parish in newly-settled territory would include also the implied wish that they remain in the locality, to become a part of the general body of clergy of all kinds working under the jurisdiction of the bishop, hearing confessions of priests, nuns and laity and generally taking up the ordinary duties of pastors and curates. Some persons may not thoroughly agree with these latter words, because it is true that not all think alike. The fault is not with the men, but with that famous " implied contract " of bygone days. What did it contain and include? In the absence of clear certitude, it

does seem right to go back to the diocesan conditions existing in the days when the first religious priests began to preach and minister to the colonists from other lands. There was little hesitancy in seeking their aid, and there was little desire for their short stay. There was need of priests, and no distinction was closely drawn between the diocesan and religious clergy for the simple reason that their canonical differences were unimportant, compared with the real necessity of setting up parishes and churches for the many new arrivals from other shores. It is easier to presume perpetuity in these implied contracts than any notion of brevity or transitoriness.

There are in existence not only these " implied contracts ", however, but also real contracts, signed and sealed and authenticated. They are most specific, and far from stating that religious are " only administrators with the right to surrender the position on six months' notice to the bishop " [2] they determine a much more lasting status.

It would be too much to expect that all these documents would have the same wording, because local conditions may have a great influence upon both contracting parties. Here is a copy of one original form:

> This contract made on the ..... day of .....19.... by and between His Excellency ..... Bishop of ..... and the Very Reverend ....., Superior General of ..... attest:
>
> 1. That His Excellency ..... Bishop of ..... for himself and his successors in office, and with the advice of his Consultors, and after having received a decree from Rome, grants in perpetuity to the aforesaid religious community of ..... the parish of Saint ..... whose limits are .....
> 2. The Superior General of the ..... for himself and his successors, hereby agrees to administer the aforesaid parish in matters both spiritual and temporal in accord with all the ecclesiastical laws, by providing a sufficient number of priests to meet the actual and future needs of this parish.
> 3. The Superior General of the aforesaid Community agrees to erect or cause to be erected, with revenues of the parish, such buildings as a school, church, parochial residence when the need arises, subject always to the approval of the Bishop of the diocese.
> 4. The priests of the aforesaid community appointed as parish priests or assistants in this parish shall enjoy the same rights and privileges, and shall be subject to the same obligations as obtain in the case of other parish priests and assistants in the aforesaid diocese of .....

[2] Dr. Hannan, *op. cit.*, p. 333.

5. The Superior General of the aforesaid community for himself and his successors agrees to conform to canon 456 of the Code of Canon Law for the appointment of the pastor of this parish, to canon 454, § 5 for his removal, and to canon 476, § 4 for the appointment of his assistants.

At this place in the agreement, the signature and the seal of the bishop are placed upon the document, followed immediately by the signature and the seal of the major religious superior. On some documents there are four additional signatures of witnesses, two for the bishop and two for the religious superior. These extra witnesses are probably not necessary, except for additional solemnity and formality, but it is advisable to have them, so that both signatories are better protected. At the foot of the page (or sometimes on an extra page itself) there is placed either the indult of the Holy See or an express reference to it, thus:

In virtue of Indult n..... Sacred Congregation of the Council, we grant to the community of ..... the aforesaid parish of ..... according to above written contract.

(Signed) .....

Bishop of .....

Duplicates of this document are made, and both signatories receive signed and sealed copies. If the bishop keeps the original indult in his archives, then the religious get an exact copy of it; and vice versa.

There is one term in an indult of the Sacred Congregation of the Council which has strong legal aspects to it. A bishop had petitioned for the indult which would allow him to concede a parish *in perpetuum* to a group of missionary priests. The Holy See granted the indult, " Ita tamen ut animarum cura dictis missionariis concredita intelligatur ad nutum Sanctae Sedis."

There can be no wonderment at this term *ad nutum Sanctae Sedis*. The interesting feature is that it proves such religious pastors have stability and permanence, not being merely temporary administrators " ad nutum episcopi."

V. Religious Parishes Before and After the Code

Doctor Hannan, in his cited article, discussed the canonical situations created in the United States when the Church law declared that parishes were benefices, and he drove a sharp distinction between the status of a secular pastor and a religious pastor. The

former (he declares) automatically became a canonical pastor, but the latter did not.

A reverential disagreement may again be made, and that for many reasons. The Code itself refers in innumerable places to both, and calls them equally "parochi". The Code of Canon Law did not make any attack upon the status of religious pastors, and in fact it made explicit provision for their proper installation, nomination or removal. (Canons 454 § 5, 456, 1425 § 2). There is nothing lacking to make a canonical parallelism between the secular pastor and his religious confrere. In the case of a religious parish it must be remembered that the pastor is only a temporary appointee, often changed every three or six years, but the community perdures with as much stability as the diocese itself. In a sense, the community is the pastor, and its appointee sits in the chair of authority for an allotted span.

In all probability the status of religious parishes after the Code was the same as that of other diocesan parishes, and all the usual privileges gained by the ordinary secular pastor went also to his religious confrere. To distinguish between their rights and status is unnecessary. To limit the religious pastor's rights on the grounds that he is only a temporary administrator is to beg the question by presuming what has to be proven; and it must be proven in the face of canons 454 § 5, and 456, both of which completely ignore all notions of temporary appointment and tenure of the "parochus religiosus", and never allude to any such equivocal status. The canons of the Code do not deny proper permanence to religious pastors, and the novelty of imagining them all to be merely temporary administrators is something that appears unsound. It is impossible to take refuge in the distinction based on the presence or absence of Roman approval for the rightful holding of the parish. If there was never an indult granted, the parish is always invalidly held and managed. Everyone is ready to admit that, and rightly so. But if there was an indult, then the actual "locum tenens" has right to all the privileges and prerogatives that the Code, the Councils and the statutes confer. The coming of the Code of Canon Law did not drive a wedge into the powers of religious pastors or religious parishes. The accent and the stress of the law is on the parish itself, not upon the seculars or the religious who administer it.

VI. Perpetuity In Contracts

The wording of an agreement will often tell whether it stands or falls " ad nutum episcopi ", or " ex utroque consensu ". Explicitly or implicitly this element of transiency is often set down in black-and-white, and that is a highly desirable policy for contracting parties to follow. If a contract is breakable, good public policy will dictate that sufficient notice be given, so that neither party may be injured needlessly.

If a religious community and a bishop have agreed upon a contract that consigns a parish *in perpetuum* to the care of a religious group of men, even that contract does not possess absolute and perfect unbreakableness. By mutual consent such a contract may be broken or set aside, in case future events produce substantial changes in the matter or the circumstances. Even without this mutual consent, one of the aggrieved parties may have recourse to Rome, and the Congregation of the Council may void the agreement.

Cases are on record where many of these contracts have been thus voided, because the passing of the years had brought such substantial changes that the observance of the terms would have accomplished notable harm or even serious inconvenience. Americans recall a case where Rome sustained a bishop who desired to erect and maintain his own diocesan seminary, even though an episcopal predecessor had contracted with a religious community " in perpetuum " to train the priests for that diocese. So too can canonists recall a case where Rome sustained a local bishop whose jurisdiction had been too circumscribed by an ancient agreement, whereby most of the diocese had been consigned to the care of religious priests. Pacts such as these may have been wise when they were formulated, but the passing of years and the coming of newer conditions showed their essential fault. It is easy to pick flaws in past agreements, but it is not fair to judge the remote past by present conditions.

Even though a contract has been made *in perpetuum*, any one of the parties may have recourse to the Roman See for proper adjustment, in case the strict observance of its terms would cause a definite and serious hardship. The natural rules of justice demand that the parties to any agreement suffer the ordinary inconveniences which an uncertain future brings in its train, but equity will be ready to ease the burden of calamitous and unforeseen results.

In that sense, therefore, even " perpetual " contracts are breakable, but not at the whim of either party. When a " ius quaesitum " is at stake, it takes the majesty of a higher court to soften

the stipulated terms. Agreements between a bishop and religious community that are *in perpetuum* are breakable, therefore, not *ad nutum episcopi,* or even *ad nutum Instituti* but only *ad nutum Sanctae Sedis.* Such an arrangement is perfectly proper and eminently satisfactory, because it gives each contracting party a right to a hearing and a defense in case of need.

VII. Conclusions

1. Religious communities need an indult before they may validly accept a parish in a diocese.
2. Parishes may be consigned to religious communities either *in perpetuum* or *temporanee.* The *locum tenens* of each is a canonical pastor, if the common law of the Code has been rightly observed.
3. Parishes may be surrendered on six months' notice only if they have been *temporanee* consigned to the religious community. Other parishes consigned *in perpetuum* must be managed properly in accord with the agreements and with common law, and only the Sacred Congregation of the Council is competent to void such a contract in case of dispute.
4. Implied contracts are not necessarily temporary in duration. There is nothing in their nature which excludes perpetuity of existence.
5. There are grounds for believing that prescription can operate in these matters, if all elements are present for its existence.
6. The equities involved in such cases could easily amount to a highly significant factor in any determination of proper procedure affecting the parish.[3]

Newburgh, N. Y. Eugene A. Dooley, O.M.I.

[3] The Jurist appreciates the opportunity to present this study by Dr. Dooley. The original study was concerned with a mission that had been entrusted to a religious community prior to the Code either in the absence of permission from the Holy See, or, granted such permission, in the absence of an express contract securing stability of tenure to the religious community. Of course, the status of the incumbents of such a mission after the Code was also involved; the conclusion was that their status was not changed. There was no question raised as to the change in the status of the mission as such. If only stability of tenure was lacking to such a religious institute, that is, if the permission of the Holy See had originally intervened, prescription would be available after the Code. This was admitted in the original study, since the only argument used against prescription was the absence of the permission of the Holy See. With these qualifications, Dr. Hannan is unwilling to reject the arguments he proposed.

THE PARISH PRIEST AND THE FEDERAL INCOME TAX UNDER THE REVENUE ACT OF 1942

I will not now call you servants.—John 15: 15.

The Federal Revenue Act of 1942 presents several important questions to diocesan priests and their bishops. Correct answers to these questions require investigation into both canon law and common law.[1]

One of these questions is: Is the money received by a Roman Catholic Priest for Mass intentions and for marriage, baptism, and funeral services, income or gifts?

Another question is: Are the normal monthly payments of approximately $83.33 to a pastor and approximately $50.00 to an asistant-pastor, salary or gifts?

Still another question is: Who, if anyone, withholds the 5% Victory Tax from the monthly payments to the pastors and pays the same into the United States Treasury?[2]

If the money from Mass intentions, and from marriage, baptism, and funeral services, are gifts, the money is not taxable as income.

The Internal Revenue Code, as now amended, provides: Section 22, (b) The following items shall not be included in gross income and shall be exempt from taxation under this chapter . . . (3) Gifts, Bequests, and Devises and Inheritances.—The value of property acquired by gift . . .

In the case of *Bogardus* v. *Commissioner of Internal Revenue*, 302 U. S. 34, decided on November 8, 1937, Mr. Justice Sutherland, who delivered the opinion of the United States Supreme Court, said: "The question for decision is whether a sum of money . . . was 'compensation' subject to the federal income tax, or a 'gift' exempt therefrom."

In the course of the opinion, Mr. Justice Sutherland declared:

[1] Assistance by Daniel E. O'Brien, A.B. Harvard College, LL.B. Harvard Law School, LL.M. Boston University Graduate School of Law, a member of the California Bar, in matters pertaining to the common law is gratefully acknowledged.

[2] This "Victory Tax" is a 5% tax on incomes over $624 a year. In the case of those subject to the tax who receive wages and salaries, employers must withhold and pay into the United States Treasury 5% of the excess of the wages and salaries over $12 a week beginning January 1, 1943. Cf. The Revenue Act of 1942, sections 450 to 476.

> . . . The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation. . . .
>
> If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. To determine that question we turn to the facts. . . .

The majority of the United States Supreme Court concluded that the transaction (not, it is true, an offering to a priest, but involving similar implications) was a gift and held that it was not taxable.

It is submitted that the delivery by a Roman Catholic layman to a Roman Catholic priest of a sum of money for celebrating and applying a Mass [3] is a gift with a condition precedent [4] in the common law, and that title to the money vests in the priest "when, as, and if" the Mass is said in accordance with the request of the layman.

Neither a bilateral contract nor a unilateral contract between the layman and the priest is created at common law by the transaction.

The layman makes no promise to pay the money. Consequently there can be no bilateral contract for a bilateral contract requires mutual promises.

[3] "Applicatio Missae est actus voluntatis, quo pro determinatis personis et determinato fine, sacerdos intendit sacrificium offerre, seu vult ut eis obveniat fructus Missae ministerialis seu specialis." Herve, *Manuale Theologiae Dogmaticae*, IV, 162.

"Applicatio Missae est actus voluntatis, quo sacerdos sacrificium offert pro aliqua persona vel ad determinatum finem." Tanquerey, *Synopsis Theologiae Dogmaticae*, III, 570.

[4] "The donor may impose upon the donee the performance of certain requirements as a condition precedent to the vesting of title in him, and in such case the donee must comply with the condition before he can claim title in himself. He must take the gift with the condition attached thereto or not at all. . . ." 28 *Corpus Juris* 646. Compare this common law requirement with Canon 833: "Praesumitur oblatorem petiisse solam Missae applicationem; si tamen oblator expresse aliquas circumstantias in Missae celebratione servandas determinaverit, sacerdos, eleemosynam acceptans, eius voluntati stare debet."

The normal unilateral contract is one in which a promisor agrees to carry out a promise in the future in return for the performance of a requested act which the promisee does not bind himself to perform by a promise. The layman makes no promise to pay the money to the priest for the application of the Mass. He has already paid it. His side of the transaction has been fully executed. When the priest celebrates and applies the Mass, the transaction is fully executed on both sides. The transaction, therefore, cannot properly be described as a contract at common law.[5]

The layman does not intend to make a business bargain with the priest. The priest does not intend to make a business bargain with the layman. There are no business dealings as between adverse parties and at arms' length. The layman does not seek from the priest as consideration for the delivery of the money a binding *promise* on the part of the priest to say a Mass. The layman wants the *act* of applying the ministerial or special fruits of a Mass to be performed by the priest. A reasonable Catholic layman would understand that the sum of money was not the price or exchange for the Mass, nor for a promise to say the Mass. Even more so, if possible, does the priest know that the sum of money is not the price or exchange for the Mass. The layman merely makes an offering to a natural object of his bounty. All Catholics know that " it is a *dogma of revelation* that the Mass is a true sacrifice, that it has the same Chief Priest and the same ends as the bloody offering on the tree of the Cross . . . In the Mass, Christ as perfect Man offers Himself in obedience, adoration, thanksgiving, satisfaction to the Father in the name of the human race to acknowledge God's supreme dominion over life and His right to perfect obedience from His creatures." [6] The Catholic layman knows that the Mass is not the consideration of the delivery of the sum of money, for this would be simony,[7] but, on the contrary, he knows that he is making an offering to the priest that will become complete in the event that the priest says the Mass as requested.[8]

[5] Williston on *Contracts* (Revised Edition, 1936), §§ 13 and 14.

[6] Lydon, *Ready Answers in Canon Law* (1927), p. 371d.

[7] " Sacerdos non accepit pecuniam quasi pretium consecrationis eucharistiae, hoc enim esset simoniacum, sed quasi stipendium suae sustentationis."—S. Thomas, *Summa Theologica,* II-II, q. 100, a. 2, ad 2.

[8] Cf. Williston, *op. cit.,* § 112.

Take a typical case: A parishioner says to the priest: "Father, please say a Mass for the soul of my mother;" and he hands to the priest $1.00. The priest replies: "Very well." The priest enters in his Mass Intention Book the name of the deceased person, the amount of the money, the name of the person who made the request, and the date. Later, on saying the Mass, the priest completes the transaction and makes an entry to this effect in his Mass Intention Book.[9]

Now assume that the priest instead of replying, "Very well", and no more, says: "All right, I'll say the Mass." Here the promise of the priest is not enforceable at common law. The transaction is not one of contract at common law, but a gift with condition precedent. By canon law, however, the priest is required to say the Mass.[10]

Finally, assume that the layman did not deliver any money to the priest at the time of his request, but said: "I'll bring you $1.00 next week, Father." The priest said the Mass as requested. Here, the promise of the layman is not enforceable at common law on the ground that the promise is a mere gratuity.[11] But Merkelbach reminds the layman that he is bound *ex justitia* to make the offering to the priest.[12]

In canon law the money delivered to the priest for the application of a Mass is called a "stipend", which word is a contraction for "*stipendium*" from "*stips*", a gift, donation, alms (given in small coin) and "*pendere*" to weigh out. The Church approves of the practice of accepting stipends.[13] "The stipend, of course, is not the equivalent of the Mass, but it probably represents the bread and wine which the faithful in former ages gave to the clergy and the sacrifice of the Mass."[14] "In canon law stipend is a general desig-

[9] Canon 844.

[10] Canon 828: "Tot celebrandae et applicandae sunt Missae, quot stipendia etiam exigua data et accepta fuerint."

[11] Cf. Williston, *op. cit.*, § 112.

[12] Cf. Merkelbach, *Summa Theologica Moralis* (Brussels: Desclee, 1942), III, 305.

[13] Canon 824, § 1: "Secundum receptum et probatum Ecclesiae morem atque institutum, sacerdoti cuilibet Missam celebranti et applicanti licet eleemosynam seu stipendium recipere."

[14] Lydon, *Ready Answers*, p. 489.

nation of means of support (*sustentatio congrua* or *congrua*) provided for the clergy." [15]

Stipends which are given directly to the priest by the laity out of devotion or to fulfill the will of a deceased person are called "Manual Stipends".[16] It is the right of the Bishop to decree the amount of the manual stipend for his diocese.[17] This amount should be proportionate to the cost of living in order to relieve any economic distress of the clergy.[18] An individual priest is permitted to accept a larger stipend or, unless the bishop has forbidden it, a smaller one,[19] but he is forbidden to exact anything above the amount determined by the bishop of the diocese.[20] The legislation of *The Code of Canon Law* concerning fees and stipends is contained in canons 463, 827-844, 1056, 1234-1237, 1504-1507, and 1909.[21]

As a general rule, a priest is not permitted to say more than one Mass a day for a stipend. If the priest could say a Mass for a

[15] Cf. "Stipend"—*The Catholic Encyclopedia.*

[16] Canon 826, § 1: "Stipendia quae a fidelibus pro Missis offeruntur sive ex propria devotione, veluti ad manum, sive ex obligatione etiam perpetua a testatore propriis heredibus facta, *manualia* dicuntur."

[17] Canon 831, § 1: "Ordinarii loci est manualem Missarum stipem in sua diocesi definire per decretum, quantum fieri potest, in dioecesana Synodo latum, nec sacerdoti licet ea maiorem exigere." Cf. Statutes of the Archdioecese of Los Angeles: "Taxae diocesanae ad normam sequentem definiuntur: Pro Missa lecta $1.00; Pro Missa de Requie in Anniversario $5.00", Stat. n. 106.

[18] "The Diocesan Tax for Masses: To Be Proportionate to Cost of Living (Case, S. C. Conc.) *AAS* 10-504 [15 June 1918]. In a case decided by the Sacred Congregation of the Council, the Sacred Congregation advised the Ordinary of a certain diocese to raise the amount of the diocesan tax or stipend for manual Masses, so as to make it proportionate to the increased cost of living, rather than to give pastors the faculty of reducing the number of Masses.

"Diocesan Tax for Masses: Increase Recommended in Italy (Letter, S. C. Consist.) *AAS* 11-277 [29 June 1919]. Ordinaries of Italy were advised by His Holiness, Benedict XV, through the Sacred Consistorial Congregation, to raise the diocesan tax for manual Masses to at least three *lire*, to relieve the economic distress of the Italian clergy." Cf. Bouscaren, *Canon Law Digest*, I [under Canon 831].

[19] Canon 832: "Sacerdoti fas est oblatam ultro maiorem stipem pro Missae applicatione accipere; et, nisi loci Ordinarius prohibuerit, etiam minorem".

[20] Cf. Canon 831, § 1, *supra.*

[21] See The Jurist, I (1941), 335.

stipend on each day of the year, and received the ordinary Mass stipend [22] therefor, he would receive a total of $365 in stipends for his support for the year. But a priest cannot say a Mass every day in the year for a stipend. For instance, he is not permitted to accept a stipend for the parish Mass *pro populo* on eighty-seven days of the year. Then too, he may not be able to say Masses when ill and when on vacation. There are other occasions when he is not permitted to accept a stipend for saying Mass. Moreover, a priest will celebrate Mass on many days of the year without having any stipends or requests from the laity.[23]

It is evident that a priest does not receive in Mass stipends an amount adequate for his decent support. According to St. Alphonsus a priest's Mass stipends should equal one-half to one-third only of his daily allowance for support.[24]

It is true that the priest may receive, in addition to the above, funeral, baptism, and marriage stipends. In the event that he is permitted to receive one or more of these stipends it is submitted that they are received as gifts and not income.[25]

The rule is well settled that the validity of a gift depends upon the laws of the state where made. In California, for instance, a gift is defined to be a voluntary transfer of his property by one without any consideration or compensation therefor.[26] This is believed to be a fair statement of the law of gifts as it exists in practically all, if not all, the states of the United States.

The money received by a Roman Catholic priest for Mass intentions, marriage, baptism, and funeral services is bestowed voluntarily by the Catholic layman without any consideration or compensation therefor, and consequently is not income, but a gift, and therefore is not subject to the Federal Income Tax.

The Commissioner of Internal Revenue, however, has promulgated the following regulation:

> . . . marriage fees, baptismal offerings, sums paid for saying Masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered . . . are income to the recipients.[27]

[22] Cf. Canon 824, § 2; and Archdiocese of Los Angeles Statute n. 106, cited *supra* in note 17.

[23] Cf. Canon 824, § 2.

[24] Cf. Merkelbach, *op. cit.*, III, 375, see also *infra*, note 31.

[25] Cf. "Fees and Stipends"—THE JURIST, I (1941), 335.

[26] Civil Code, § 1146. See *Ingram v. Colgan*, 106 Cal. 113, 124.

[27] Reg. 103, s. 19.22 (a) 2.

This regulation has never been upheld in any judicial decision. On the contrary, it was adversely considered in the case of the Reverend Francis J. Ross v. City of Philadelphia and the Receiver of Taxes, decided in the Superior Court of Pennsylvania on April 22, 1942.[28]

The facts of the Ross case are as follow: An ordinance of the City of Philadelphia, known as the " Income Tax Ordinance ", imposed an annual tax on earned income, and divided earned income into two classifications:

(a) " Salaries, wages, commissions and other compensation " paid by employers, who are required to deduct the tax at the time of payment and pay it to the Receiver of Taxes; and

(b) " The net profits earned " upon business, professions, or other activities . . . as to which each person whose profits are subject to the tax is required to make his or her own return and pay the tax to the Receiver of Taxes.

" Net profits " was defined as " the net gain from the operation of a business, profession, or enterprise after provision for all costs . . . expenses . . ."

The ordinance also provided: " The Receiver of Taxes . . . is empowered . . . to prescribe . . . regulations."

The Receiver of Taxes promulgated the following regulation: " Clergymen, Religious Workers, Evangelists, etc. Marriage fees, baptismal offerings and other monies received by clergymen, religious workers or evangelists for the performance of religious services, or in connection therewith, are considered as income from a profession or activity, the net profits of which are taxable as income under the terms of the Ordinance."

The Receiver of Taxes copied the aforesaid regulation of the Commissioner of Internal Revenue to the effect that " marriage fees, baptismal offerings and sums paid for saying masses for the dead " are income.

The Reverend Francis J. Ross, a Roman Catholic Priest of the Archdiocese of Philadelphia, received sums of money from individuals at whose request he said Masses, performed marriages, baptisms and funeral services.

By canon law, all these payments were voluntary offerings.

[28] Reported in 25 Atlantic (2), 834. See The Jurist, II (1942), 409.

Father Ross contended that at common law offerings were not income but gifts and were not taxable.

Thereupon the Receiver of Taxes notified Father Ross to make a return and pay the specified tax upon said offerings, or be subjected to penalties for failure to do so.

Upon receiving this notification, Father Ross brought a bill in equity in the Court of Common Pleas of Philadelphia County, requesting in substance that the said offerings be declared not income and so not taxable.

The City of Philadelphia moved to have Father Ross's bill dismissed. After argument, the Court of Common Pleas sustained the contention of the City and dismissed the bill.

Father Ross appealed to the Superior Court.

The only question involved upon this appeal was one of law, viz.: "Are voluntary offerings made to a Roman Catholic clergyman at marriages, baptisms, funeral services, masses and prayers for the dead, earned income or net profits within the meaning of the Ordinance?"

The Superior Court held in a divided decision, Judge Cunningham writing the opinion for the majority, that: Voluntary offerings made to a clergyman at marriages, baptisms, funeral services, masses and prayers for the dead, are neither earned income nor net profits earned within the meaning of the Philadelphia Income Tax Ordinance.

The *ratio decidendi* was: ". . . the offerings . . . although received by appellant [Father Ross] by virtue of his profession and in the performance of his religious activities are pure gratuities which under the canons of his church, he has no right to demand but is permitted to receive when tendered . . ." [29]

Judge Cunningham also said:

> "(5) Nor are we persuaded that regulations promulgated by the Commissioner of Internal Revenue as interpretive of the Federal Income Tax Act, relied upon below, are in any way controlling here. The regulation of the Receiver of Taxes for Philadelphia with which we are dealing in this case, was evidently suggested by a ruling of the Commissioner of Internal Revenue that
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> > 'Marriage fees, baptismal offerings, and sums paid for saying Masses for the dead' constitute 'compensation for personal services' within

[29] 25 Atlantic (2), 834.

the meaning of Section 22(a) of the Internal Revenue Act, 26 U.S.C.A. Internal Revenue Code, section 22(a). Regulation 103, section 19.22(a)2.

"But neither that regulation nor any of those cited by the appellees [City of Philadelphia and Receiver of Taxes] has so far as we are aware, been upheld in any judicial decision. . . ."

Keller, P.J. and Baldrige and Stadtfeld, J.J. concurred with Judge Cunningham. Rhodes and Hirt, J.J. dissented.

Thus by the Ross case, the only judicial decision on the question, at common law, stipends for masses, marriages, baptisms and funerals are gifts and not income.

The following sentence from the opinion of Mr. Justice Butler in the case of *M. E. Blatt Co.* v. *United States*,[30] is significant in respect to the regulation of The Commission of Internal Revenue under discussion:

"Treasury Regulations can add nothing to income as defined by Congress."

The Revenue Act of 1942 raises the question: Are the normal monthly payments of approximately $83.33 to a pastor and approximately $50.00 to an assistant pastor, salary or gifts?

As the priest would not receive from stipends an amount adequate for his decent support,[31] the Church provides another source of support for the parish priests, viz.: Voluntary offerings by the parishioners. At the same time the Church provides that the priest cannot engage in any business or gainful occupation.[32]

"The voluntary offerings of the people made on Sundays, and other occasions, were also intended in part for the maintenance of clerics that they might not be compelled to engage in pursuits which might ill become the ecclesiastical state or withdraw the clergy from their spiritual work."[33] As early as the Sixth Century, the free will offerings of the people were divided into four equal parts,

[30] 305 U. S. 267 (1938).

[31] According to St. Thomas stipends are but a partial means of support for a priest since there are other means by which his support is provided because during the remainder of the day the priest may preach, teach, or do other similar things with which he may be supported. Cf. Herve, *Summa Theologiae Dogmaticae*, IV, 173.

[32] Canon 142: "Prohibentur clerici per se vel per alios negotiationem, aut mercaturam exercere sive in propriam sive in aliorum utilitatem."

[33] Cf. "Stipend"—*The Catholic Encyclopedia.*

one each for the clergy, the support of the Church, the bishop, and the poor.[34] Once a month the bishop "distributed 'living expenses' to the priests and clergy of his territory."[35] This practice of making a distribution of living expenses once a month exists today.[36]

It is the normal procedure for the pastor of a parish to deposit in a bank on Mondays the entire collections received on the preceding Sunday. Title to this money is never in the parish priests as individuals. The bank account is always in the name of the parish,[37] which in California, is an unincorporated association of the parishioners, for example, St. Bernard's Church, Los Angeles, or St. Bernard's Parish, Los Angeles.

The pastor administers this fund for the welfare of his parishioners under the supervision of the bishop. He is authorized by quasi-contract with his parishioners to withdraw amounts from the fund for the support of himself and his assistants. These amounts are the present day equivalents of the monthly allotments for living expenses which obtained in the time of Pope Gelasius in 494. They are free-will offerings of the parishioners for the support of the clergy and are received directly by the parish priests from the parishioners without a conduit.

The local bishop decides the amount necessary for decent support, but there is no absolute guarantee concerning a definite sum. Indeed the Third Plenary Council of Baltimore stated that priests were to be content with less than the amount determined for decent support in case their church did not have sufficient revenue to supply

[34] Comyns, *Papal and Episcopal Administration of Church Property*, n. 147, The Catholic University of America Canon Law Studies (Washington: The Catholic University Press, 1942), p. 17; the author quotes Pope Gelasius (494); Cf. Migne, *Pat. Lat.*, LIX, 561; c. 27, CXII, q. 2.

[35] Comyns (*op. cit.*, p. 19), quoting Cyprian, Ep. 28 from *MPL*, IV, 502.

[36] For convenience, in ordinary conversation, the monthly living allotment given to a priest is called his "salary". The word is used loosely so far as common law terminology is concerned. The whole tone of the Church's law and teaching, however, indicates that the intention is to make this so-called "salary" a gift in recognition of the priest's right to a decent living, not a payment for his services.

[37] Archdiocese of Los Angeles, Statute 213: "Pecuniae paroeciales apud mensam nummulariam (bank) ne deponantur nomine proprio parochi; sed depositum pecuniale nomine tituloque ecclesiae seu paroeciae inscribatur et a parocho subsignetur."

this amount.[38] In the Archdiocese of Los Angeles, the Archbishop has indicated the amount for each pastor to be $83.33 a month and for each assistant-pastor $50.00 a month. In other dioceses the monthly allowances may be more or less. In certain dioceses there is no determined monthly allowance, but a special collection which is taken up on Christmas and Easter, is given in its entirety to the pastor for his decent living.

A definite ceiling on the aggregate amount which a priest may receive from his parish and from stipends has been set by the Church. " He should not only have what is necessary for sustenance, but sufficient for fitting recreation and hospitality, and a modest portion for future contingencies: he may also assist near relatives to some extent. If anything remains, it is to be used in charitable works." [39] Lehmkuhl and Merkelbach in treating of this ceiling say that it is a relative amount. It is to be estimated according to the dignity of the individual priest, his merits and labors.[40]

The logic that the monthly payments to parish priests are gifts and not salary is inescapable.

If the monthly payments are salary, the priest receives the money under *a contract of employment* at common law, because " the term ' salary ' implies a contract of employment ".[41]

If the priest receives the money under a contract of employment, he receives it as *an employee or servant,* at common law. For " the relation of master and servant is that which arises out of a contract of employment . . . between a master or employer on the one hand and a servant or employee upon the other hand ".[42]

[38] " Minori tamen summa contenti sint oportet sacerdotes, casu quo eorum missio vel missiones per reditus suos annuos statutam congruam suppeditare nequeant, cujus rei judex erit Ordinarius, audito Consultorum consilio. Nolumus enim ut salaria ex bonis ecclesiae jam acquisitis percipiantur; et Episcopus vel diocesis nulla lege tenentur salarii defectum supplere, si qua de causa sacerdotes missionarii nullum vel justo minus acceperint, dummodo tamen, juxta monitum Apostoli (I Tim. VI, 8) necessaria ad alimenta et tegumenta non desint, nisi forte hic ipse necessariorum defectus, iudicio Episcopi cum consultoribus, gravi culpa ipsius missionarii accidisset." III Plen. Conc. Balt., n. 273.

[39] Cf. " Stipends "—*The Catholic Encyclopedia.*

[40] Lehmkuhl, *Theologia Moralis,* I, 1071; Merkelbach, *loc. cit.*

[41] 54 *Corpus Juris,* 1124.

[42] 39 *Corpus Juris,* 33.

If the priest receives the money as an employee or servant, he receives it from an employer or master who has the power to discharge him as an employee at common law. "Master. He is deemed to be a master who has the superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in details".[43] "Inasmuch as the right to control involves the power to discharge, the existence of this power is essential and is an indicium of the relationship."[44]

There are several common law judicial decisions on the subject of whether or not a parish priest is an employee under a contract of employment. All these cases deal with the relationship between the parochial priest and his bishop. These cases are:

Alphonse Rose v. *John Vertin,* 46 Mich. 457 (1881).
Tuigg v. *Sheehan,* 101 Pa. 363 (1882).
Father Baxter v. *Bishop McDonnell,* 155 N. Y. 83 (1898).

In the Rose case, the plaintiff sued as assignee of a claim of Father Joseph F. Bernbe, who was a parish priest of the Roman Catholic Church. John Vertin was his Bishop. The priest claimed that there was due him as salary for services rendered to the parish the sum of $300.00. Suit was brought against the bishop in an action of contract.

The case raised the following question: Was there a contract of employment at common law between the bishop and the parish priest?

The Supreme Court of Michigan gave judgment for the bishop on the ground that there was no contract of employment between the bishop and the priest.

The Court, by Judge Graves, said, in part:

> The main facts in the case are undisputed and the only question is concerning their effect, and in my opinion they show distinctly that the relation between Bishop Mrack and the priest was never that of hirer and hired in any sense implying an obligation on the bishop to pay the priest. The bishop was the priest's superior and according to the established order of things in the economy of the church government, regulating the degrees of subordination and the methods of administration, it was the province of the bishop to designate the place for the priest to exercise his functions and prescribe under certain limitations the rules and precepts for his guidance and control. Both were common servants of the church, and the service of the priest was not a service for the bishop, nor was

[43] 39 *Corpus Juris,* 33.

[44] 39 *Corpus Juris,* 35, 36.

> the bishop, in respect to the employment, a principal. In the course of administration the bishop assigned the priest to a theater of duty and gave him certain rules and instructions, and it was manifestly understood on both sides that the bishop was not to be responsible in law for the salary. On the contrary, the conclusion from the facts is unavoidable that the council of the congregation, on whom the diocesan regulations cast the duty to provide support for the clergy, were wholly trusted to supply the necessary means. . . .

In the Father Sheehan case, there was an action of contract by Father Sheehan against Bishop Tuigg to recover $2,400.00 alleged to be due Father Sheehan as "salary for maintenance as a priest of the diocese" for three years during which he was refused a parish or support by the bishop.

Father Sheehan contended:

> At his ordination, a priest renounces the right to perform secular labor and promises to hold himself subject to the call of the bishop for church duties. In return, a title to decent support is guaranteed him. This is an essential without which, by the laws of the Church, ordination is impossible. America being a missionary jurisdiction, having no benefices, the priest must look to the bishop for his support and there is an implied contract between a bishop and a priest that the bishop shall supply him with the means of existence. For the breach of this contract, assumpsit will lie.

The bishop argued:

> No promise to support Father Sheehan, or to pay him a salary, was shown. The relations of bishop and clergy imply no promise of support upon which a contract can be based, which will maintain an action of assumpsit.

The case raised the following question: Was there a contract of employment at common law between the bishop and the priest?

The Supreme Court of Pennsylvania, Mr. Justice Paxson writing the opinion, gave judgment for the bishop on the ground that there was no contract of employment between the bishop and the priest.

Judge Paxson said, in part:

> The plaintiff alleges that the law of his church creates a duty from which springs an implied contract on the part of the bishop to support him so long as he remained a priest of the diocese, and was not convicted of any offence, or suspended from his priestly functions. Is this position sound? The obvious test is to reverse the position and treat this as a suit by the bishop to recover damages from the plaintiff for a failure to perform his priestly functions or any duty prescribed by his ordination

> vows. No one will contend that such a suit could be maintained. The plaintiff can lay down his office and its duties at pleasure. For doing so he could only be visited with ecclesiastical censure, and such punishments, if any, as the canons of the church prescribe. The bishop would have no remedy in the courts of law. It will thus be seen that there is no mutuality. . . .
>
> *It would be doing a wrong to the Catholic Church and degrade its priesthood from their high position were we to hold that the relation between the bishop and his priest was that of hirer and hired, of employer and employee.*[45] The moving consideration in such contracts is the pecuniary advantages flowing from the relation. When a priest dedicates his life to the church and takes upon himself the vows of obedience to its laws, he is presumed to be actuated by a higher principle than the hope of gain. Where he has an actual contract with his congregation or his bishop for a salary, it may be enforced as any other contract; but where he relies upon the duty of his church to support him he must invoke the aid of the church if he seeks redress.

In the Baxter case, Father Baxter, a Roman Catholic priest, sued his bishop for back salary of about $4,000.00 on the ground that there was an implied contract in common law between the bishop and the priest obligating the bishop to make good the difference between $1,000 a year, the usual allowance for pastors in the diocese, and $200.00 which the priest actually received as pastor from parish funds. Father Baxter also sought to recover in this suit the difference between $1,000 a year and the sum of $300.00 a year for the period during which he served as a hospital chaplain after he had been transferred from his pastorate.

Father Baxter did not contend that he had an express contract of employment with the bishop but he did contend that a contract of employment at the rate of $1,000.00 a year was implied in common law as a legal consequence flowing from the relation of bishop and priest created by canon law.

The case raised the question: Was there a contract of employment at common law between the priest and the bishop?

The court gave judgment for the bishop on the ground that there was no contract of employment at common law between the priest and the bishop.

Judge Vann, who wrote the opinion, said in part:

> The claim of the respondent [Father Baxter], that the bishop, individually, is the employer of the plaintiff and liable as such for his compensation,

[45] Italics inserted.

> is not sustained by the complaint. The legal relation of master and servant is not alleged, either expressly or impliedly . . . Obviously this relation is in no sense that of master and servant, but that of ecclesiastical superior and inferior. . . .

The Father Bernbe case, the Father Sheehan case and the Father Baxter case are very persuasive judicial authority in support of the proposition that the parish priest does not receive income in the form of " salary ", at least, within the meaning of the Revenue Act of 1942.

The Church, herself, in the Rite of Ordination to the priesthood, indicates that there is no relation of master and servant between the bishop and the priest. In the course of the ceremonies of ordination the bishop goes to the Epistle side of the altar just after Communion has been given to the newly ordained priests and intones the following: " Jam non dicam vos servos, sed amicos meos . . ." " I will no longer call you servants, but my friends . . .", the very words of Christ to his first priests as set forth in John 15:15.

The contention that the bishop pays to the parish priest a salary is supported neither by logic nor by common law authority. There is no provision in canon law imposing liability on the bishop, personally, or on the bishop as a corporation sole, for any salary for a parish priest,[46] although there is a duty on the part of the bishop, which canon law attaches to the relation of bishop and parish priest, that he see to it that the parish assignment is such as will yield the parish priest decent support.[47]

But that support is to come from the parishioners in the form of gifts, as we have already seen. The words of Judge Graves in the Father Bernbe case are very pertinent. He said:

> Men are constantly going into positions under appointment by superior agents and where no liability for compensation rests on the employing agent and the means of payment, if they come at all, are to come from another source. Cases of illustration are infinite. They abound in busi-

[46] III Plen. Conc. Balt., n. 273, cited *supra* note 38.

[47] Canon 981, § 2: " Ordinarius presbytero, quem promoverit titulo servitii ecclesiae vel missionis, debet beneficium vel officium, vel subsidium, ad congruam eiusdem sustentationem sufficiens, conferre."

Canon 979, § 2: " Hic titulus debet esse et vere securus pro tota ordinati vita et vere sufficiens ad congruam eiusdem sustentationem secundum normas ab Ordinario pro diversis locorum et temporum necessitatibus et adjunctis dandas."

> ness operations, and marked instances may be seen in the great missionary enterprises which are carried on. No one supposes the existence of a legal liability on the part of the appointing agency. . . .

There is no legal liability on the part of the parishioners to pay the parish priest a salary. When assigned by his bishop to a parish, the parish priest enters into no contract of employment with his parishioners. The parishioners do not have the superior choice, control, and direction of the priest in the performance of his duties as a priest and cannot discharge him. Clearly the relation of employer and employee does not exist between the parishioners and the priest.

The bestowal of the normal monthly payments of approximately $83.33 to a pastor and $50.00 to an assistant-pastor is in the category of gifts, even under the test proposed by Mr. Justice Brandeis in his dissenting opinion in the Bogardus case. He said:

> What controls is the intention with which payment, however voluntary, has been made . . . Has it been made to show good will, esteem or kindliness towards persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

The voluntary contributions of parishioners towards the support of their parish priests are " made to show good will, esteem or kindliness towards persons who happen to have served, but who are paid without thought to make requital for the service." The payments to the priests constitute " spontaneous generosity " for the decent support of the priests as required by canon law, divine positive and natural law.[48] As Mr. Justice Sutherland said in the Bogardus case:

> If it be in fact a gift, that is an end of the matter; and inquiry whether it be a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable there can be no such thing under the statute as a taxable gift.

It is submitted that both common law logic and authority warrant the conclusion that the money received by a Roman Catholic priest for Mass Intentions and for marriage, baptism and funeral services is not income, but, on the contrary, is a gift.

It is also submitted that the normal monthly payments of approximately $83.33 to a pastor and approximately $50.00 to an assistant-pastor are gifts and not salary.

[48] See " The Obligation of Church Support "—THE JURIST, I (1941), 343.

It follows inescapably, that neither the bishop nor the parishioners, nor any one else, are under any duty, nor have they the right, to withhold the Victory Tax from the monthly payments to the pastors and pay the same into the United States Treasury.

Rev. Kenneth R. O'Brien

Los Angeles, California

THE MARONITE LAW OF ABSTINENCE

The Maronites of my parish have arranged for the visit of a prominent countryman to this town on the Wednesday of Ember Week. They did not advert to this fact when they invited him. They have arranged for a banquet in the evening. Is it feasible to petition the local ordinary for a dispensation from the obligation of abstinence in favor of all who attend the banquet?

Parochus

The proper law of the Maronites with reference to the obligation of fast and of abstinence differs considerably from the law of fast and abstinence now current among Catholics of the Latin rite.[1] For the Maronites the Synod of Mount Lebanon (1736) prescribed four seasons of fasting within the course of each year. The Lenten fast was made to extend from the Monday after *Quinquagesima* Sunday to Holy Saturday inclusively; the fast before Christmas was to begin with December 5th and to end with the Vigil of Christmas inclusively; the fast in preparation for the Feast of the Assumption of our Blessed Lady was to be observed from August 1st to August 14th inclusively; and the fast preceding the Feast of the Holy Apostle Peter and Paul was to be of obligation from June 15th to June 28th inclusively. This law of fasting was not of obligation on certain designated feast days which occurred during the Lenten season, namely, the Feast of Presentation of our Blessed Lord in the Temple (February 2), the Feast of St. Maro (February 9), the Feast of St. Joseph (March 19) and the Feast of the Annunciation (March 25). Likewise the law of fasting did not bind the Maronites on the Feast of the Transfiguration of our Blessed Lord (August 6) or on the Feast of the Nativity of St. John the Baptist (June 24). Yet, even on these feast days the law of abstinence from meat, eggs and the products of milk was kept in force.

[1] Cf. Constitutiones et Canones S. Synodi Montis Libani (1736), Pars I, cap. IV—*Collectio Lacensis*, II, 107-108.

The Lenten fast prohibited the taking of any food or drink whatsoever from midnight to noon. The law of fast as established for the other three seasons of fasting insisted on abstinence solely from meat, eggs and the products of milk for the period from midnight to noon. The Wednesdays and Fridays throughout the year were set aside as days of abstinence. A few exceptions were made however. The law of abstinence did not bind on the Wednesdays and Fridays falling between Christmas and Epiphany, or between Easter and Pentecost, inclusively, nor on the Wednesday and Friday in the week preceding the beginning of the Lenten fast, nor on the following feasts, if they fell on a Wednesday or Friday, namely, the Feast of the Transfiguration of our Lord, the Feast of the Assumption of our Blessed Lady, the Feast of the Nativity of St. John the Baptist and the Feast of the Holy Apostles Peter and Paul.

For an urgent public necessity there could be granted a dispensation from the law of fast from June 15th to June 24th inclusively, from August 1st to August 6th inclusively, and from December 5th to December 12th inclusively. But the Patriarch was not to grant the dispensation in a general fashion, but rather only for one season of fasting at a time, and then only for that particular year, according to the needs of a specific locality, of a particular time or of a special cause.

In his Apostolic Letter *Orientalium dignitas Ecclesiarum*, November 30, 1894, Pope Leo XIII stated indeed that Orientals who live outside of their patriarchal territory fall under the administration of the Latin clergy, but he also declared that they remain attached to their particular rite, so that they come under the jurisdiction of their Patriarch as soon as they have returned to his territory.[2] The law which was thus enunciated by Pope Leo XIII and which implied a continued subjection to their proper law on the part of Orientals who had fallen under the administrative direction and government of Latin ordinaries gave rise in 1928 to a series of questions concerning the Maronites. It was asked, first of all, whether Maronites resident in the United States of America were bound by the laws of The Code of Canon Law.

[2] § IX: "Quicumque orientalis, extra patriarchale territorium commorans, sub administratione sit cleri latini, ritui tamen suo permanebit adscriptus; ita ut, nihil diuturnitate aliave causa ulla suffragante, recidat in ditionem Patriarchae, simul ac in eius territorium revenerit."—*Codicis Iuris Canonici Fontes*, n. 627.

The Sacred Congregation for the Oriental Church replied to this query in the negative, not only pointing to the ruling of canon 1 of the Code, which exempts Orientals from the purely ecclesiastical laws of the Code, but safeguarding also the law invoked by Pope Leo XIII, as already quoted. It was asked, moreover, whether Maronites in this country were bound in the matter of fast and abstinence by the laws of the Code and the decrees of the Latin local ordinary. The Sacred Congregation, to this as to the previous question, replied in the negative. But it added: "The Holy Father has deigned to extend to the Maronites and to all Orientals who have a domicile or quasi-domicile in America, the Indult which he granted to the Ruthenians living in the United States and Canada, namely, of conforming to the laws of the places as regards fast and abstinence." [3]

From these two replies it is evident that the Maronites in this country enjoy the privilege of conforming to the laws of the Latin Code, but are not under any obligation to do so. In the case as here submitted it plainly appears that the group of Maronites is in practice conforming to the laws of the Code in the matter of fast and abstinence, for the question raised is directly connected with the observance of the law on an Ember Day, which as such is not part of the Maronite law.

Can the local ordinary, instead of seeking to grant a dispensation from the law of abstinence, simply advise the Maronites to hold to their own proper law for that occasion, which of itself will exempt them from the observance both of fast and of abstinence, provided that the particular Ember Day in question does not fall within one or other season of fast prescribed by their own proper law? There seems to be no unquestionable requirement of law that would bar such a course of action. On the other hand, inasmuch as the Sacred Congregation of the Council has indicated in a particular reply that non-residents must submit either to the one or to the other optional practice, namely, of abstaining either on Wednesday or on Saturday during Lent, in order to fulfill the requirement of the general law concerning abstinence from meat on two days each week,[4] and in

[3] The Latin text of this reply, issued on December 19, 1928, is printed in *The Ecclesiastical Review,* LXXX (1929), 385. Father Bouscaren's translation, as here used, is contained in his *Canon Law Digest,* I (Milwaukee: Bruce, 1934), 4-5.

[4] Cf. *Acta Apostolicae Sedis,* XVI (1924), 94. Cf. also Bouscaren, *Canon Law Digest,* I, 54-5.

view of the fact that the spring and winter Ember Days will always fall within the periods indicated for the Maronites as seasons of fast, and that even the summer Ember Days, by way of exception as in the year 1943, can fall within the season of fast observed by the Maronites in preparation for the Feast of the Holy Apostles Peter and Paul, a more feasible mode of procedure and a more practicable solution may possibly be sought through a determination of the local ordinary's power to grant a dispensation from the obligation to observe the law of the Code as accepted by the Maronites.

Canon 1245, § 1, grants wide powers to local ordinaries, and even to pastors, for dispensing from the law of abstinence, but the exercise of this power is conditioned by the fact that the granted dispensation must be bestowed only upon individual members of the faithful, or at most upon individual families, and not to an entire parish or community as such. The circumstances in the proposed case may possibly be such that only a relatively small number of families is involved in the dispensation that is sought. Under that supposition not only the local ordinary but also the pastor would be empowered to grant the dispensation by bestowing it individually upon the various families so that in the end all who are present will share in the dispensation.

But if the Maronites who are to be present at the banquet constitute a large assembly, then the very fact of the large number in attendance will suffice as a reason for which the local ordinary may grant the desired dispensation. In the matter of verifying the phrase "*magni populi concursus*" mentioned in canon 1245, § 2, the case here considered seems not to differ fundamentally from the "case of an extraordinary attendance of the people of a single parish at a feast celebrated in the church", concerning which the Code Commission replied that it satisfied the demand set by canon 1245, § 2, as an acknowledged cause or a legitimate reason for the granting of the dispensation by the local ordinary.[5] Even if a weighty objection could be raised concerning the nature of the circumstances as constituting a sufficient cause for the granting of the dispensation, still there would not be present any doubt about the validity or the legality of the grant of the dispensation, for a cause which exists as doubtfully sufficient is recognized by the lawgiver as a justifiable

[5] Commissio Pontificia Interpretationis, 12 mart. 1929, ad III—*AAS*, XXI (1929), 170.

basis for the lawful seeking of a dispensation, and if upon such a request the dispensation is granted, it stands acknowledged as being bestowed both lawfully and validly.[6]

Inasmuch as no request for a dispensation from the law of fast is contemplated, the dispensation from abstinence when granted can of course not be interpreted as implying also a dispensation from the fast. The wording of the grant in the dispensation would have to make it plain, either expressly or in some equally forceful and effective manner, that the double dispensation was intended and granted. But perhaps it is the option which the law itself gives in canon 1251, § 2, namely, of interchanging the evening meal with the noon meal as the one at which no quantitative limitation is set by the law of fast, that has left it unnecessary to seek for a further dispensation from the law of fast, once the dispensation from the law of abstinence has been granted.

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INFORMAL MARRIAGE

About two years ago a boy of this parish attempted marriage with a non-Catholic girl. After the attempt they did not immediately live together, but the girl decided that she would first take instructions, come into the Church and then have the marriage validated. During the course of instructions, the boy suffered a collapsed lung and was rushed to the hospital. Since we thought that there was danger of pneumonia setting in and the consequent danger of death, I hurried to get a dispensation for mixed religion and without thinking of the necessary delegation married them in the hospital room. Since that time I have received the girl into the Church, they reside in our parish and have one child.

My problem is: Is the marriage a valid one? Would this by any chance come under Canon 1098, 1, or do I have to get a renewal of consent from them and marry them over? If necessary, of course, I will do that, but would hate to disquiet them if it is not necessary.

VICARIUS COOPERATOR

Answers for the problems arising out of Canon 1098 have been given by the Pontifical Commission for the Authentic Interpretation of the Code in which it was stated that the mere absence of the pastor or Ordinary does not suffice for the marriage before witnesses only but that there must exist moral certainty, based either on common knowledge or inquiry, that for one month the pastor will

[6] Canon 84, § 2.

be neither available nor accessible without grave inconvenience;[1] that the absence requisite is physical absence,[2] although the latter includes the situation in which the pastor or Ordinary, though materially present in the place, is unable by reason of grave inconvenience to assist at the marriage.[3]

Moreover, decisions of the Sacred Roman Rota indicate that Canon 1098, inasmuch as it contains an exception to the law, is to be interpreted strictly. So where a pastor testified that he was actually available and would gladly have assisted at the marriage, the *bona fide* belief of the parties that such was not the case did not render Canon 1098 applicable to their marriage. The marriage was therefore null.[4] And in another case, the fact that the pastor resided twelve kilometers away was not in itself, in the absence of grave inconvenience explicitly alleged and proved, sufficient to entitle the parties to the benefit of Canon 1098.[5]

In the present case, the lack of grave inconvenience seems to be obvious from the fact that the officiating priest was able to obtain a dispensation from the impediment of mixed religion from the local Ordinary. There is hardly a doubt that the officiating priest would have sought proper delegation if he had thought of it, even at the very moment of the interrogation of the parties. A further difficulty that might arise out of Canon 1044 is solved first by the fact that the officiating priest could hardly dispense with the form when he didn't advert to the need of a dispensation; and secondly by the argumentation already presented to indicate that he was not a priest officiating in virtue of Canon 1098.

The Ordinary's quinquennial faculties from the Sacred Congregation of the Sacraments do not warrant his granting a *sanatio in radice* when the invalidity is due to lack of form, because in reference to the cause of invalidity for which the local Ordinary is rendered competent, it is indicated that a minor impediment alone justifies his action. On the other hand, while the faculties from the Holy Office do warrant the sanation by the local Ordinary of a mar-

[1] 10 Nov. 1925—*AAS*, XVII (1925), 583; Bouscaren, *Canon Law Digest*, I, 542.

[2] 10 Mar. 1928—*AAS*, XX (1928), 120; Bouscaren, *loc. cit.*

[3] 25 July 1931—*AAS*, XXIII (1931), 388; Bouscaren, *loc. cit.*

[4] 30 Jan. 1926—*R.D.*, XVIII, 17; Bouscaren, *op. cit.*, II, 153.

[5] 29 July 1926—*R.D.*, XVIII, 287; Bouscaren, *op. cit.*, II, 154.

riage invalid for lack of form when one party is a non-Catholic, the later conversion of the non-Catholic party places the marriage under the competence of the Sacred Congregation of the Sacraments. Further, the faculties of the Most Reverend Apostolic Delegate extend to a marriage invalid for lack of form even if both parties are Catholics, but only in the case when one of the parties refuses to renew consent or when if one were required to do so there would be grave harm or grave peril induced for the other.

In the instant case, if danger should result to either party from a disclosure of the invalidity or if scandal would probably ensue, the parties could be left in good faith. Both the peril and the scandal should be grave. However, in the former case, it would seem possible to inform the party from whom harm is not to be expected, and then apply to the Most Reverend Apostolic Delegate for a sanation. If neither grave harm nor grave scandal is anticipated, a renewal of consent should be obtained.

THE SANITY OF A TESTATRIX

A family in whom I am interested is greatly disturbed because of a will involving about $900,000. Although they are first cousins to the testator and were very closely associated with her during her life, the entire family and their children inherited only $3,000 each (one received only a thousand which sum she refused as she would have lost the old age pension) or a total of $16,000. The remainder was left to Catholic charities. Now these people are good Catholics. They did not attempt to contest the will in civil court though some lawyers assured them they had good grounds because of the suspected mental condition of the testator.

As I mentioned, they were very close to this woman; they visited back and forth. On numerous occasions she told them that when she died they would have no further worries; they would be taken care of. She even hinted that she was leaving individuals of this group $100,000. A number of witnesses are obtainable to support this contention. Now they do not hope for and would not attempt to obtain any large portion of the legacy but they seem to think it unjust they did not receive a larger share. They wonder if they could obtain satisfaction of some kind through the ecclesiastical court. What is your opinion of the matter? In strict justice I don't see any very solid grounds.

PROCURATOR

The diocesan tribunal is competent to pass on the capacity of the testator. The competent tribunal is that of the domicile of the testator.[1] It would seem that a collegiate tribunal should hear the

[1] Canon 1560, § 4.

testimony.[2] The decree would be subject to appeal in the usual manner. Experts may be heard as well as laymen.[3] The court is not bound by their testimony as conclusive.[4]

The presumption favors sanity in the secular courts of the United States. As a matter of procedure, this rule would not seem necessarily to be incorporated into canon law under Canon 1529, even though it does have reference to the actual validity of the contract. The actual capacity of the testator would be governed by Canon 1529, it is true; but not the proof of it or the rules of proof. On the other hand, the maxim of law, *omnia rite acta praesumuntur*, indicates that the same presumption should be accorded recognition in a suit in an ecclesiastical tribunal. But once *prima facie* proof is presented of incapacity, the burden of proof is shifted to those claiming under the will.

Even absurd acts do not necessarily constitute *prima facie* evidence of insanity; nor peculiar dispositions made in the will itself, such as the endowing of a home for stray cats. *A fortiori*, the exclusion of one's relatives is not such evidence. Eccentricity is not insanity.

The case as presented does not offer *prima facie* evidence of insanity and the *libellus introductorius*, if it showed no further cause of action, would have to be dismissed on the plea of the beneficiaries that it is insufficient to state an actionable right.

DOOR COLLECTIONS. CONVERTS

Can you help me secure more light on the words: "probeque instructus", in Canon 752, § 1? My experience as a priest for the last 14 years shows me a great variety among priests' convert-work as to the amount of instruction, the time, methods, etc.

2. In light of Canon 1181, what is to be said of our American practice of taking "seat-money" from the faithful as they enter the parish churches? Can "custom" justify this usage?

NEO-SACERDOS

Regarding the query in the matter of Canon 1181 and the practice of collecting admissions to Mass at the doors of the church, there can be no legitimate doubt that the practice is unlawful. Nor can

[2] Canon 1576, § 2.

[3] Canons 1792-1805.

[4] Canon 1804.

it be justified by custom, since, even supposing the custom to be sufficiently common, forty years have not yet elapsed since the promulgation of the Code; and that period of time is required by the Code itself to make a custom legitimate. Moreover, Canon 1181 actually forbids the rise of any such custom, which therefore can never become legitimate, no matter what its age.

This practice was forbidden in both the II and III Plenary Councils of Baltimore (n. 397 of the former and n. 288 of the latter). The II Plenary Council notes that Cardinal Barnabo in writing to the Archbishop of Cincinnati in February 1862 indicated that Pope Pius IX had signified his displeasure on hearing of the practice.

Canon 752, § 1, leaves much to particular legislation as to the amount of instruction needed. N. 230 of the II Plenary Council of Baltimore contains all the national legislation we have on the subject, and it is not much more specific. It states: "Adultus autem ratione utens, . . . baptizari non debet, quin prius ea quae necessario sunt credenda fuerit edoctus, et Christiani hominis officio satis facturum se spondeat." Synodal statutes, or statutes of provincial councils, could particularize. If they do, they are binding, within the bounds of epikeia. If there are no such particular laws, each priest must follow his own conscience.

Jerome D. Hannan

The Catholic University of America

Decrees and Decisions

CANONICAL

SACRA CONGREGATIO DE SACRAMENTIS

FACULTIES PERMITTING CANONICAL PROCEDURE "SUPER RATO"

BEATISSIME PATER

Exc.mus Delegatus Apostolicus in Statibus Foederatis Americae Septemtrionalis, votis omnium Ordinariorum illius regionis favens, ad pedes Sanctitatis Tuae provolutus, humiliter petit auctoritatem concedendi iisdem Ordinariis facultatem conficiendi processum canonicum in causis dispensationis super matrimonio rato et non consummato, cum, attentis praesentibus circumstantiis, perdifficile prorsus sit recurrere, singulis in casibus, ad S. Sedem.

SS.mus Dominus Noster Pius div. prov. Pp. XII, in Audientia diei 13 Julii 1942, infrascripto Cardinali Praefecto concessa, attentis expositis, Exc.mo Delegato Apostolico in Statibus Foederatis Americae Septemtrionalis, auctoritatem de qua in precibus benigne impertitur, perdurante praesenti bello. Servatis in omnibus de iure servandis.

Datum Romae, ex Aedibus eiusdem S. C.
die 17 Julii 1942.

D. CARD. JORIO, *Praef.*

L. * S.

F. BRACCI, *Secr.*

SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL

FACULTIES FOR COURT OF THIRD INSTANCE

BEATISSIME PATER

Excellentissimus ac Rev.mus D.nus Joannes Amletus Cicognani, apud Status Foederatos Americae Septemtrionalis Delegatus Apostolicus, Excellentissimorum Archiepiscoporum et Episcoporum illius regionis nomine, petit ut in eadem regione Tribunal instituatur quod in tertio gradu causas matrimoniales cognoscere et definire possit. Rationes huius gratiae implorandae sunt communicationum postalium difficultates ac pericula ob ingravescens bellum.

DIE 30 JULII 1942

Ss.mus D.N. Pius, divina providentia Papa XII, in audientia E.mo ac Rev.mo D.no Cardinali Praefecto impertita, habita relatione superascripti libelli una cum voto Congressus huius S. Tribunalis, petitam facultatem benigne concessit ita ut causae matrimoniales, quae in primo et in secundo gradu apud tribunalia regionis iudicatae sint, in tertio gradu a Tribunali regionali Metropolitano in singulis causis ab ipso Delegato Apostolico designando cognosci as definiri possint, facta tamen in singulis causis expressa mentione apostolicae delegationis, ac servato iure defensoris vinculi et partium appellandi pro tertia instantia, si maluerint, ad S. Rotam necnon recurrendi ad Signaturam Apostolicam post judicium tertiae instantiae, ad normam can. 1603 C. J. C. § 1 n.n. 3 et 5.

Praesentibus valituris ad triennium, contrariis quibuscumque non obstantibus.

HENRICUS CARDINALIS GASPARRI, *Praefectus.*

L. * S.

F. MORANO, *a Secretis.*

ACTA OFFICIORUM

PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS

RESPONSA AD PROPOSITA DUBIA

EMI PATRES PONTIFICIAE COMMISSIONIS AD CODICIS CANONES AUTHENTICE INTERPRETANDOS PROPOSITIS IN PLENARIO COETU QUAE SEQUUNTUR DUBIIS, RESPONDERI MANDARUNT UT INFRA AD SINGULA:

I—DE DISPENSATIONIBUS MATRIMONIALIBUS

D. An vi canonis 81, conlati cum canone 1045, Ordinarius dispensare valeat ab impedimentis matrimonialibus intra fines eiusdem canonis 81, etsi nondum omnia parata sint ad nuptias.

R. Affirmative.

II—DE INCARDINATIONE RELIGIOSI SAECULARIZATI

D. Utrum verba canonis 641, § 2: *Episcopus potest probationis tempus prorogare,* intelligenda sint tantum de prorogatione expressa, an etiam de prorogatione tacita.

R. Negative ad primam partem, affirmative ad secundam.

III—De Iure Accusandi Matrimonium

D. Utrum, secundum canonem 1971, § 1 1° et responsum diei 17 iulii 1933 ad II, inhabilis ad accusandum matrimonium habendus sit tantum coniux, qui sive impedimenti sive nullitatis matrimonii causa fuit et directa et dolosa, an etiam coniux qui impedimenti vel nullitatis matrimonii causa exstitit vel indirecta vel doli expers.

R. Affirmative ad primam partem, negative ad secundam.

Datum Romae, e Civitate Vaticana, die 27 mensis Iulii, anno 1942.

M. Card. Massimi, *Praeses.*

L. * S. I. Bruno, *Secretarius.*[1]

ACTA TRIBUNALIUM

SACRA PAENITENTIARIA APOSTOLICA

I

DECRETUM

Indulgentiae Augentur Tactui Paenitentialis Virgae Adnexae

Quinto ac vicesimo feliciter exacto anno, ex quo SSmus Dominus Noster Pius divina Providentia PP. XII Episcopali fuit dignitate ornatus, cum Ipse eiusmodi celebrationem percupiat spirituali modo a christifidelibus peragi, cumque novum paternae benevolentiae Suae documentum Ecclesiae filiis praebere voluerit, divino Iesu Christi sanguine redemptis, Indulgentiam paenitentialis virgae tactui adnexam ea, quae infra exponitur, ratione adaugere dignatus est.

Scilicet in Audientia infra scripto Cardinali Paenitentiario Maiori die viii mensis Iunii data, trecentorum dierum Indulgentiam semel in die lucrandam christifidelibus omnibus concessit, qui quolibet anni die, in Basilicis Lateranensi, Vaticana, Liberiana, Ostiensi, Minores Paenitentiarios adierint, seseque, christianae humilitatis sinceraeque contritionis sensibus animatos, paenitentiali virga tangendos submiserint.

Christifidelibus autem, qui Emum Cardinalem Paenitentiarium Maiorem, munere suo statutis maioris hebdomadae diebus in memoratis quattuor Basilicis fungentem, adierint, quique iisdem sensibus animati, paenitentiali virga tangendos se pariter submiserint, *partialem septem annorum Indulgentiam* lucrandam benignissime concessit.

[1] *AAS*, XXXIV (1942), 241.

Praesenti in perpetuum valituro absque ulla Apostolicarum Litterarum in forma brevi expeditione, et contrariis quibuslibet non obstantibus.

Datum Romae, e Sacra Paenitentiaria, die 20 Iulii 1942.

N. Card. Canali, *Paenitentiarius Maior.*

L. * S. S. Luzio, *Regens.*[1]

II

DECRETUM

Augentur Facultates Circa Indulgentiarum Concessionem

In fere innumeris observantiae, amoris pietatisque documentis, quibus christifidelibus quintum ac vicesimum emensum annum, ex quo Augustus Pontifex Pius XII Episcopali dignitate insignitus est, spirituali modo, ex expressa ab eodem Summo Pontifice voluntate, concelebrant, ea peculiari ratione Sanctitati Suae grata obveniunt, quae vel a Purpuratis Patribus vel ab Excellentissimis Episcopis locorumque Ordinariis undique catholici orbis Eidem admoventur; utpote qui communis Patris Pastorisque animo proprius adsint, Eiusque gravissimas curas in Ecclesia gubernanda participant.

Quam quidem gratam voluntatem ut Sanctitas Sua testetur, utque paternam sollicitudinem Suam erga universum Sibi creditum gregem ostendat, spiritualem Ecclesiae thesaurum latius patere voluit; atque adeo in Audentia, die viii mensis Iunii infra scripto Cardinali Paenitentiari Maiori concessa, haec, quae sequuntur, decrevit ac statuit:

I. Facultas impertiendi Benedictionem papalem cum Indulgentia plenaria, de qua in can 914 Cod. Iur. Can., ita adaugetur, ut Episcopis ter in anno, Abbatibus autem, Praelatis *nullius*, Vicariis ac Praefectis Apostolicis bis in anno eam impertire liceat ad normam eiusdem canonis.

II. Itemque facultas Indulgentias concedendi, Abbatibus ac Praelatis *nullius* per can. 323 data, Vicariis vero ac Praefectis Apostolicis per can. 294, atque Episcopis residentialibus per can. 349 § 2 2° impertita, sic augetur, ut iisdem liceat *Indulgentiam centum dierum* concedere. Facultas autem Archiepiscopis per can. 274 2° data, ita pariter adaugetur, ut *ducentorum dierum Indulgentiam*

[1] *AAS*, XXXIV (1942), 239.

iisdem concedere liceat. Ac postremo, facultas Emis Patribus Cardinalibus per can. 239 § 1 24° concessa, ita amplificatur, ut iisdem fas sit *trecentorum dierum Indulgentiam* dilargiri.

Praesenti in perpetuum valituro absque ulla Apostolicarum Litterarum in forma brevi expeditione, et contrariis quibuslibet non obstantibus.

Datum Romae, e Sacra Paenitentiaria, die 20 Iulii 1942.

N. Card. Canali, *Paenitentiarius Maior.*

L. * S. S. Luzio, *Regens.*[1]

Permission has been granted to military chaplains serving at the front to offer Mass without an altar stone, using instead an antimensium, i. e., a consecrated corporal containing relics of the saints sewn into it.

* * * *

The Archbishops and Bishops of Quebec have authorized the use of mineral oils or their extracts, such as paraffine, in the sanctuary lamp.

* * * *

The Australian bishops now enjoy discretionary power to dispense Catholics from the obligation of the Friday abstinence for the duration of the war

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"Prerequisites of International Order", embodying the Holy Father's Peace Appeals, has appeared in book form.

SECULAR

NEW YORK RULING ON ANTE-NUPTIAL AGREEMENTS

A somewhat startling series of rules of law have been set down in the conclusions[2] of the Domestic Relations Court of the City of New York, Family Court Division, Richmond County, March 12, 1942, Justice O'Brien presiding. They deserve to be recorded in the words of the Court which were as follows.

"(9-14) From a consideration of the case, and the decisions herein cited, these rules of law are clearly established: (a) An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a

[1] AAS, XXXIV (1942), 240.

[2] These are the conclusions in a long and well-developed case on the civil status of Catholic ante-nuptial guarantees. It is *Ramon v. Ramon*, 34 New York Supplement, 2d Series, p. 100. The excerpt given appears on pp. 112, 113.

Catholic has thereby irrevocably changed the status of the Catholic party, is an enforceable contract having a valid consideration; (b) the Court will take judicial notice of the religious and moral obligations of the parties; (c) the spiritual and Catholic training of a child amid religious persons or institutions of its own faith is paramount over any material considerations; (d) a holding that religious training of children may be dispensed with until they reach maturity upon the theory that they then may adopt any or no religion as they deem fit, is repugnant to our American background and traditions; (e) a court and especially the Domestic Relations Court is bound to approve the demand of a Catholic parent that its child be given a Catholic education and a Catholic upbringing in a Catholic home or institution, Domestic Relations Court Act, Art. 3, Sec. 88; (f) the Court will take judicial notice that the Roman Catholic Church is the only church whose members are bound by its rules and discipline under penalty of excommunication to require Catholic training and education of their offspring; (g) the fact that a child, in violation of the ante-nuptial contract, has for a period of time been brought up in some other religion than that fixed in the ante-nuptial agreement, is not sufficient ground to deprive the respondent of his rights to have the child educated in the religion fixed by the ante-nuptial contract.

"It is clear that the respondent is entitled to have the child brought up in the religion agreed upon in the ante-nuptial contract. It is equally apparent that the child being baptized Catholic is entitled to and must receive the training and education of that faith. . . ."

The bill clarifying tax exemption in the District of Columbia has passed both Houses of Congress—Cf. THE JURIST, II (1942), 410, 411.

* * * *

The United States Supreme Court has determined that constructive service suffices in divorce proceedings. Justices Murphy and Jackson dissented, regarding the majority view as an invasion of State rights not required by the "full faith and credit" clause of the Federal Constitution—Cf. THE JURIST, II (1942), 429.

* * * *

The United States Supreme Court, by a 5-3 decision, upheld the right of a defendant to waive trial by jury, even though he did so without professional legal counsel.

Lord Gowrie, Governor General of Australia, has ruled that the National Security Act forbids any statement by advertisement or otherwise intended to promote the use of contraceptives.

* * * *

Circuit Judge James E. Spier upheld the Michigan Act of 1941 against contraceptives. The decision was rendered in a suit of the Sanitary Products Distribution Association which reportedly does a $100,000 business in Michigan. It first obtained a temporary court order restraining police from seizing vending machines selling the forbidden article. The court also upheld the restriction of sales through pharmacists and physicians, holding that the law was not class legislation. As affecting public morals and welfare, the merchandising was held to be a subject of legislative control.

* * * *

By a decisive vote, the amendment to the Constitution of Massachusetts which would have legalized the dissemination of "birth control" information and advice was defeated in the election of November 3.

* * * *

The Board of Christian Education of the Presbyterian Church in the United States has been held subject to the State Mercantile License Tax by the Court of Common Pleas in Philadelphia. The Board is a non-profit corporation; but the Court said that the Act does not exempt charitable organizations. However, it held that the Board would not be exempt, even if the Act did exempt charitable groups, because the profits of the corporation, though turned over entirely to charitable purposes, were proximately profits of a business.

Reviews of Periodicals

Philosophy of Law and Government

H. C. Robbins, "Common trends in proposals for a just and durable peace"—*Anglican Theological Review,* XXIV (1942), 217-228 (reviews protestant and jewish conferences, programs of councils on World peace, the program of Pope Pius XII, and suggests discussion of the common trends).

Chr. Dawson, "The Papacy and the new order"—*Dublin Review,* CCX (1942), 109-115 (on the Pope's teaching on spiritual reconstruction of the world).

J. Maritain, "The Natural law and human rights"—*Dublin Review,* CCX (1942), 116-124 (defines the Natural law as the mass of things to do and things not to do which follow in a necessary manner from the simple fact that man is man; shows the foundation of human rights in this law, as following from the transcendental dignity of the human person, in the spiritual order as well as in society).

A. J. Carlyle, "The history and significance of the conception of Natural law"—*Dublin Review,* CCX (1942), 124-130 (reviews briefly the conceptions of some ancient pagan writers, of Justinian, of the Fathers, of St. Thomas, and of English philosophers on Natural law; cites some medieval legal texts on justice).

L. Sturzo, "Authority and Democracy"—*Dublin Review,* CCX (1942), 151-163 (shows that democracy cannot be justified by such concepts as "human nature is good in itself" or "sovereignty of the people"; that the powers of Congress, President, the Electorate, etc., represent an authority that comes from God; that the idea of christian authority was present in the corporate state of the Middle Ages, with a contractual relationship between king and communities, more than in the publicist theories of modern times; that the Church never accepted the post-reformation idea of a "divine right of kings". Democracy is defined as a mutual limitation of functions of authority, with corollaries concerning obedience, morality of laws, legitimacy of power, just and unjust war).

Chr. Dawson, "Christian freedom"—*Dublin Review,* CCXI (1942), 1-8.

E. G. Roelker, "The State"; "The Church"; "The citizen of the State and the faithful of the Church"—*Ecclesiastical Review,* CVII (1942), 161-176; 255-270; 337-352 (describes in the first article the foundation of the State in the Natural law, the source of its authority, its relation to welfare, and its essential duties, as given by Natural law, regarding the common good and the legitimate exercise of power; in the second article, the marks of the true Church are shown in their relation to her power of ruling and lawmaking; the development of details of her organization, the relations to the State, and her power of judicially enforcing the church law, are demonstrated as derived from the essential elements of her divinely given constitution; in the third article the position of subjects in both these perfect societies is discussed, and

it is shown that the fundamental rule by which in the State the force of law does not depend upon the people's approval, and by which in the Church the faithful are not governing but governed, does not imply autocratic government since both the political and the ecclesiastical legislator are bound in conscience to rule justly).

A. H. Campbell, "A note on the word 'Jurisprudence'"—*Law Quarterly Review,* LVIII (1942), 334-339 (studies the various changes in the meaning of the term "Jurisprudence" and objects to its confused application in compounds as historical jurisprudence, sociological, comparative jurisprudence, etc., while it should be reserved to the purely theoretical and philosophical inquiry in Law, although even in this field the term "Philosophy of Law" would be better).

W. Ullmann, "Baldus's conception of law"—*Law Quarterly Review,* LVIII (1942), 386-399 (studies the great Italian jurist's [d. 1400] views on the general concepts and principles of law).

J. E. Turner, "Is liberty compatible with organization?"—*Philosophy,* XVII (1942), 245-249.

L. Izaga, "La soberanía civil segun Suarez"—*Razón y Fe,* CXXIV (1941), 191-205; 314-326 (studies the theories of the great theologian [d. 1617] on political sovereignty).

J. Azpiazu, "Pio XII y el llamado 'orden nuevo'"—*Razón y Fe,* CXXV (1942), 496-519 (Pius XII and the so-called new order).

M. Adler and W. Farrell, "The theory of democracy"—*The Thomist,* IV (1942), 446-522; 692-761 (continued).

General Principles of Canon Law

Boaventura de Santa Maria, "Canonização da lei civil no Codigo de Direito Canônico—*Revista Eclesiástica Brasileira,* II (1942), 89-94 (discusses the concept of *lex canonizata* and gives a list of the canons of the Code which contain references to the civil law of the relative territory).[1]

Persons—Religious

E. R. Hardy, "Post-ordination training in the Roman Catholic church"—*Anglican Theological Review,* XXIV (1942), 191-202 (reports on the practical measures by which cc. 129 ff. are carried out in American dioceses and discusses what suggestions may be drawn from Catholic training for Episcopalians. The article is followed by similar reports on post-ordination training in the Methodist and in the Episcopal churches [by J. F. Fletcher, pp. 203-209, and N. C. Powell, pp. 210-216, respectively]).

A. C. Ellis, "The chapter of affairs in a religious congregation"—*Review for Religious,* I (1942), 253-258 (studies the features, formalities and competence of business chapters customarily held after the chapter of election).

[1] It is doubtful, however, whether in all the cases enumerated the concept of *lex canonizata* is given, as "canonization" of a law means the imparting of a canonical effect to a civil law. The term should not be applied where a canon merely counsels the observance of legal solemnities in certain acts without making the civil form a prerequisite of canonical validity.—Reviewer's note.

A. C. Ellis, "Supplying days of absence from the novitiate"—*Rev. for Rel.*, I (1942), 322-326 (an interpretation of c. 556, § 2).

G. Fernandes, "A profissão religiosa e o serviço militar"—*Revista Eclesiástica Brasileira*, II (1942), 55-72 (analyzes the Decree *Inter reliquas* issued in 1911 by the S. C. Rel. [*AAS*, III, 37 ff.] and later papal documents concerning the fulfilment of military service before admission to perpetual vows; with special reference to military service in Brazil).

Sacraments

F. B. Donnelly, "A low funeral mass"—*Homiletic and Pastoral Review*, XLII (1942), 1032-1037.

J. P. Donovan, "When may deacons give communion?"—*Homil. Past. Rev.*, XLII (1942), 823-826 (argues that in c. 845, § 2, the requirement *gravi de causa* should be construed as meaning *iusta de causa*, since in the otherwise identical wording of c. 741, concerning baptism by deacons, this latter term is used and no discrimination seems to be intended by the legislator).

Marriage

J. C. Ford, "Marriage: its meaning and purpose"—*Theological Studies*, III (1942), 333-374 (a critical study of H. Doms' book, *Vom Sinn und Zweck der Ehe* [Engl. transl., *The Meaning of Marriage*, New York: Sheed and Ward, 1939]; rejects the distinction, made by Doms, between the "meaning" of marriage and its "purpose": according to Doms the "meaning" is the two-in-one community of life, a personalist value which constitutes the essence of marriage and transcends its contractual purpose, viz. the mutual tradition of the body in order to beget children. Fr. Ford insists that this purpose is an essential and constituent factor of marriage and that, even if traditional theology has sometimes neglected the personalist value, the construction of the latter as a "meaning" separate from, and above the *ius in corpus* is unwarranted).

Ecclesiastical Magisterium

J. P. Donovan, "October, 1942, or October, 1875?"—*Homiletic and Pastoral Review*, XLIII (1942), 92-104 (reproduces and discusses an article, published by Brownson in October 1875: elaborating upon an address delivered by Justice Dunne of Arizona, Brownson had attacked the Public School system and questioned its constitutionality; the author suggests it would be advisable to take up the question now).

M. Bévenot, "Christian co-operation in England today"—*The Month*, CLXXVIII (1942), 298-306.

J. La Farge, "Some questions as to interdenominational co-operation"—*Theological Studies*, III (1942), 315-332 (see also the review of recent publications on Christian co-operation, by J. C. Murray, *ibid.*, pp. 413-431).

Temporal Goods

J. P. Donovan, "The pastor and liability insurance"—*Homil. Past. Rev.*, XLII (1942), 907-910 (holds that the carrying of an adequate liability insurance for the parish, if the parish can afford the expense, is an obligation of commutative justice, and that not the pastor, but the ordinary, is the judge of the parish's inability).

Delicts

J. J. Clifford, "Sterility tests and their morality"—*Ecclesiastical Review,* CVII (1942), 358-367.

J. F. O'Malley, "Assistance of nurses at illicit operations"—*Homil. Past. Rev.,* XLIII (1942), 47-52.

History of Canon Law

P. H. Furfey, "Social action in the early Church, 30-180 A. D. (II): The dignity of the human person"—*Theological Studies,* III (1942), 89-108 (analyzes the Christian attitude towards the Roman social structure and its legal framework which was built upon a principle having no respect for man as man).

J. H. Taylor, "St. Cyprian and the reconciliation of apostates"—*Theol. Stud.,* III (1942), 27-46 (upon examining St. Cyprian's letters, the author concludes that the African church before St. Cyprian did not have, as frequently alleged, a "puritanical" tradition of never reconciling apostates; that St. Cyprian in reconciling apostates did not reverse the original penitential discipline but only adapted it to new conditions; that St. Cyprian did not suffer doubts about the bishop's power to reconcile apostates).

P. J. Alexander, "The Papacy, the Bavarian clergy, and the Slavonic apostles"—*Slavonic Year-Book,* XX, American Series, I (1941), 266-293 (discusses the background of the hostile attitude of the Bavarian bishops and the German king towards St. Methodius when the latter, appointed by Pope Honorius II to the archbishopric of Sirmium [869/870], was sent as missionary to the Slavic lands of the Danube basin. The author shows that this conflict was but an episode in the great struggle of the universal church against the encroachments of territorial churches, i. e., against the allied powers of princes and metropolitans; the conflicts of Nicholas I [857-868] with the archbishops of Ravenna, of Cologne and Treves, of Rheims, and the affair of Photius, are phases of this struggle, even as in the missionary field his intervention in the conversion of the Bulgarians; likewise in the case of St. Methodius, the Popes had to fight against the Frankish-Bavarian tradition which conceived the Southeastern missions as an instrument of extending the powers of the territorial church).

E. I. Bromberg, "Wales and the mediaeval slave trade"—*Speculum,* XVII (1942), 263-269 (contends that in Wales, differently from England, the Church did not interfere with slavery and slave trade during the early Middle Ages, except for forbidding the sale of a female slave by the master who had married her).[2]

Marjorie M. Morgan, "The excommunication of Grosseteste in 1243"—*English Historical Review,* LVII (1942), 244-250 (analyzes and publishes a newly discovered document concerning the reasons for which the prior and monks of Christ Church, Canterbury, excommunicated Bishop Robert Grosseteste who had refused to acknowledge any archiepiscopal jurisdiction of the

[2] Some incidental remarks of the author regarding the general attitude of the Church towards slavery and slave trade in the Middle Ages are not quite correct—Reviewer's note.

monks *sede vacante;* another study dealing more fully with the powers which the Canterbury Chapter claimed during the vacancy of the primatial see is promised).

Dom D. Knowles, "Some aspects of the career of Archbishop Pecham"—*Engl. Hist. Rev.,* LVII (1942), 1-18; 178-201 (among other activities of the archbishop, the author reviews also his legislation in English councils, his policy of pushing the metropolitan power to the extreme limits, if not beyond, and his visitations).

F. J. Taylor, "A mediaeval Primate and his suffragans"—*Church Quarterly Review,* CXXXIV (1942), 170-191 (studies the policy of Archbishop Pecham in the documents of the *Registrum epistolarum* and describes the conflicts between Pecham and the English bishops who admitted a certain primatial jurisdiction of Canterbury but contested the extension of the archbishop's claims which would have led to an entirely centralized church government in England).[3]

M. M. Morgan, "The suppression of the alien priories"—*History, the Quarterly Journal of the Historical Association,* XXVI (1941), 204-212 (shows that the suppression of Cluniac and of other houses of French monastic families in England, in 1414, was not a sudden attack on the landed property of the Church but an episode in an old struggle by which the Crown, since 1295, tried to bring the "alien" houses into English hands; and that this policy cannot be stamped as a prelude to the dissolution of monasteries, since most of the alien property was made over to ecclesiastical, not to lay owners).

C. J. Ryan, "The Jacobean oath of allegiance and English lay Catholics"—*Catholic Historical Review,* XXVIII (1942), 159-183 (facts and documents concerning the history of enforcement of the oath prescribed by James I).

L. Hicks, "Rome and the Counter-reformation in England"—*The Month,* CLXXVIII (1942), 307-321 (a critical review of the book published under the same title by Fr. Hughes [London, 1942]; the reviewer deplores the fact that the rôle of the Jesuits has been given an unfavorable treatment by the author).

W. E. Shiels, "Church and State in the first decade of Mexican independence"—*Cath. Hist. Rev.,* XXVIII (1942), 206-208 (shows the difficulties arising from the heritage of the Spanish *patronato real* which influential groups in the new state attempted to continue in the form of a national church, by construing the patronage as a right inherent in sovereignty; the connivance of a largely liberal clergy and of the lodges is shown).

P. L. Johnson, "Early church property in the Archbishop [*sic*] of Milwaukee"—*Cath. Hist. Rev.,* XXVIII (1942), 247-250 (investigates the reasons for the great number of "ghost churches", i. e. abandoned, dismantled or

[3] On this question, not only the correspondence of Pecham but also his statutes and their relation to the common law of the Church should be carefully studied, as the case cannot be judged without its canonical implications; cf. in particular Pope Innocent IV's decretal *Romana ecclesia* of March 17, 1246 (*Liber Sextus*: I, 8, 1; I, 13, 1; I, 16, 1; II, 2, 1; II, 10, 3; II, 15, 3; III, 20, 1; V, 9, 1; V, 10, 1; V, 11, 5). It is not true that the power of metropolitans declined only since the Council of Trent, or that since that time "each bishop holds office by the delegation of the Pope"—Reviewer's note.

converted former church edifices in Milwaukee: migrations of settlers, rerouting of roads, failure of lay builders of churches to transfer title to the church were frequent in the pioneer days. The results of researches made for 77 churches in the Archdiocese have been published in a limited edition by J. G. La Vies and P. L. Johnson, *Location and Detailed Description of Early Catholic Church Property in the Archdiocese of Milwaukee,* 1941 [distributed from the Chancery Office]).

J. B. Sägmüller, "Der kirchenrechtliche Anstoss zu Johann Adam Möhlers theologischer Entwicklung"—*Theologische Quartalschrift,* CXXII (1941), 1-13 (identifies several of the unnamed "exaggerated treatises, commentaries and text books" against which Möhler inveighed in his first book [*Die Einheit der Kirche,* 1825], when he was himself still under the influence of Febronianism and Josephinism).

C. F. Taeusch, "The concept of Usury: the history of an idea"—*Journal of the History of Ideas,* III (1942), 291-318 (a summary on the various conceptions of usury, from the Old Testament to the legal developments in England and America, including some statements concerning the mediaeval and the post-reformation doctrine of the Church).

History of Non-Catholic Church Law

G. Vernadsky, "The status of the Russian church during the first half-century following Vladimir's conversion"—*Slavonic Year-book,* XX, American Series, I (1941), 294-314 (studies the organization of the Russian church before the ordination of the first metropolitan of Kiew, in 1037; rejects the theory that the Russian bishops were, during this period, under the jurisdiction of the Bulgarian archbishop of Okhrida, and concludes from various sources that the church of Tmutorakan, founded by Photius c. 862-867. must have been towards the end of the tenth century an autocephalous archbishopric; studies the statute of Prince Vladimir, of 996, and proposes several corrections of the preserved text; sketches the gradual formation of the metropolitan administration of Kiew).

E. D. Price, "Elizabethan apparitors in the diocese of Gloucester"—*Church Quarterly Review,* CXXXIV (1942), 37-55 (discusses documents concerning the "sumners" or *apparitores,* appointed by the bishop for the service of court citations).

History of Roman Law

E. Levy, "Reflections on the first 'reception' of Roman law in Germanic states"—*American Historical Review,* XLVIII (1942), 20-29 (illustrates the penetration of Roman law in the codifications of the Visigoths, from the fifth to the seventh century, and concludes that the codes were not as largely romanized as is commonly believed: the code of Euric, which the author considers as the best legislative work of the West in the fifth century, rarely accepts the classical Roman law in full but rejects it more frequently, or accepts it in part, i. e. subject to un-roman qualifications or mixed with gothic customs; shows that many post-classical decrees of the Theodosian code which return in the Visigothic codes had been influenced on their part by Germanic customs; thus "the Germanic custom, shaped in Roman dress, returned to its source").

CASES AND CONSULTATIONS

Can. 7098 and marriages before the civil registrar or non-catholic minister (pp. 96-105)
Nature of a *sanatio in radice* (p. 154)
May a woman kill herself to preserve her chastity? (p. 156)
Curates in parishes confided to the care of a religious community (p. 160)
—J. J. Nevin, *Australasian Catholic Record,* XIX (1942)

Unconsummated marriage (p. 453: L. Vega)
Marriage of conscience and ante-nuptial relations (p. 557: M. Gómez)
Ordination of ex-religious (p. 559: G. Aguilar)
Spiritual *Cognatio* and marriage (p. 656: M. Gómez)
Preparation for first communion (p. 733: G. Aguilar)
Various classes of papal legates (p. 740: J. G. Anaya)
Administration of *viaticum* by laymen (p. 741: L. Vega)
Proper bishop for ordination; admission to exempt religion (p. 847: M. Gómez)
Dispensation from fast and abstinence (p. 850: J. Torres)
Form of liturgical vestments (p. 854: Ezequiel de la Isla)
Marriage, divorce and remarriage of protestants (p. 949: G. Aguilar)
Excommunicated priest hearing confessions (p. 952: J. D. Piñero)
Desecration of church (p. 955: J. G. A.)
—*Christus, Revista mensual,* VII (1942) [4]

Binating in a hospital chapel (p. 71)
Validation of a clandestine marriage (pp. 134-138: W. A. Ferry)
Faculties for affixing indulgences to religious objects (p. 144)
Validity of blessings (p. 312)
—*Ecclesiastical Review,* CVII (1942)

Is there conjugal hope for Phyllis? (p. 865; concerning doubtful baptism of first wife)
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Masses *pro populo* in national parishes (p. 1061)
Dedication of churches (p. 1061)

[4] Titles supplied by the reviewer.

Can priest's confession be restricted? (p. 1142)
National flag in sanctuaries (p. 1144)
Should excommunicated Catholics go to mass? (p. 1145)
Does letter of freedom give permission to marry elsewhere? (p. 1147)
One washing for altar linens (p. 1148)
Forbidden "gothic" vestments (p. 1149)
—J. P. Donovan, *Homiletic and Pastoral Review*, XLII (1942)

Two faults in distributing communion (p. 69)
To what extent must a pastor investigate an alien? (p. 71; concerning non-Catholic party in marriage investigation)
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Is there any short cause process in the Helena case? (p. 154)
—J. P. Donovan, *Homil. Past. Rev.*, XLIII (1942)

Meaning of public impediment in the Code (p. 270)
Reservation of a censure *latae sententiae* attached to a particular precept (p. 273)
—M. J. Fallon, *Irish Ecclesiastical Record*, 5, LIX (1942)

Ecclesiastical marriage and Civil law precepts (p. 170: Frei Aleixo)
Missa coram Sanctissimo exposito (pp. 172-177: Frei Aleixo)
Unconsummated marriage and religious vocation (p. 177: Frei Tibúrcio)
Ecclesiastical tithes (pp. 179-184: Frei Aleixo)
Visiting the sick and pastoral solicitude (p. 187: Frei Tibúrcio)
Impedimenta ordinis et professionis religiosae (p. 188: Frei Aleixo)
Ceremonies in celebration of marriage (p. 189: *Id.*)
Inquisitio nominis complicis in peccato turpi (p. 190: *Id.*)
Certitude of baptism (p. 191)
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Parochial or religious cemeteries? (p. 192: J. B. de Siqueira)
Functions of Vicars foraine (p. 194: Frei Aleixo)
—*Revista Eclesiástica Brasileira*, II (1942) [5]

Indulgences (pp. 285; 356)
Penance for transgression of rule (p. 285)
Perpetual vows in danger of death (p. 286)
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Dismissal of postulants (p. 357)
—*Review for Religious*, I (1942) [6]

STEPHAN KUTTNER

The Catholic University of America

[5] Portuguese titles translated by the reviewer.

[6] Titles summarized by the reviewer.

Chronicle

GENERAL

Most Rev. Edward Mooney, D.D., Archbishop of Detroit, was again chosen chairman of the Administrative Board of the National Catholic Welfare Conference at the annual organization meeting of the Board at Washington in November. Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, is vice chairman and treasurer, and Most Rev. Francis J. Spellman, D.D., Archbishop of New York, secretary. Most Rev. John T. McNicholas, O.P., Archbishop of Cincinnati, is episcopal chairman of the Department of Education; Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans, of the Legal Department; Most Rev. John J. Mitty, D.D., Archbishop of San Francisco, of the Department of Catholic Action Study; Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, of the Department of Lay Organizations; Most Rev. John Mark Gannon, D.D., Bishop of Erie, of the Press Department; Most Rev. Karl J. Alter, D.D., Bishop of Toledo, of the Department of Social Action; and Most Rev. John A. Duffy, D.D., Bishop of Buffalo, of the Youth Department. The report of the Legal Department adverted to the efforts put forth by it whereby "the employes of Catholic non-profit, tax-exempt agencies could be brought under the coverage" of the old-age and survivors insurance benefits of the Social Security Act; also in protest against a proposed program of compulsory medical service, which it was felt would strike a serious blow at non-governmental hospitals. It noted also its action in connection with proper tax exemptions, in connection with facilities for hospital construction allowable under the Lanham Community Facilities Act, in connection with War Production Board priorities and the Office of Price Administration rationing, in connection with the importation of Spanish workers, and in connection with the work of the National Budget Committee for War Appeals.

One hundred and two members of the Hierarchy of the United States, meeting at Washington, D. C., November 11-12, issued a call for victory in a document entitled, "The Bishops' Statement on Victory and Peace", and designated December 8, the Feast of the Immaculate Conception as a National Day of Prayer for Victory. Another unified War Emergency and Relief Collection was authorized for Laetare Sunday. Most Rev. Moses E. Kiley, D.D., Archbishop of Milwaukee, and Most Rev. William F. Murphy, D.D., were elected members of the American Board of Catholic Missions. Other members of the Board are Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, chairman; Most Rev. John A. Floersh, D.D., Archbishop of Louisville, Most Rev. James E. Kearney, D.D., Bishop of Rochester, Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, Most Rev. Joseph E. Ritter, D.D., Bishop of Indianapolis, and Most Rev. John J. Swint, D.D., Bishop of Wheeling.

An Inter-American Seminar on Social Studies, sponsored by the National Catholic Welfare Conference and conducted by the N.C.W.C. Department of Social Action, held meetings over a period of three weeks, August 24-September 12, in Washington, Detroit, Buffalo, and New York, and at Notre Dame University. The opening session in Washington was presided over by Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City and episcopal

chairman of the Department of Social Action, N.C.W.C. Most Rev. Edward Mooney, D.D., Archbishop of Detroit, spoke at the opening session on "The Americas and the Crisis of Christianity". On the Feast of St. Rose of Lima, August 30, patroness of the Americas, the members of the Seminar and members of the diplomatic corps in Washington gathered at St. Patrick's Church for a Pontifical Low Mass, celebrated by Most Rev. Amleto Giovanni Cicognani, Apostolic Delegate to the United States. Most Rev. Miguel Dario Miranda, Bishop of Tulancingo, Mexico, preached in Spanish and English. Most Rev. Miguel de Andrea, Titular Bishop of Temnus and director of the Catholic Workers' Center, spoke at the dinner tendered the members of the Seminar in Chicago on September 2. On September 3, Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, addressed the Seminar. Most Rev. Robert E. Lucey, D.D., participated in a program which was carried over a national hook-up during the first week of the Seminar in Washington. The Seminar was addressed in Washington by Secretary of Agriculture Claude R. Wickard and by Theodore J. Kreps, economic adviser to the Board of Economic Welfare.

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On November 1, a Pontifical Mass for Victory was celebrated in the Philadelphia Municipal Convention Hall by Most Rev. George L. Leech, D.D. His Eminence, Dennis Cardinal Dougherty, appealed on that occasion for sacrifice of private interests for the common good. A message from the President was read and broadcast over a national radio hook-up.

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Hon. Myron C. Taylor was granted his farewell audience with the Holy Father on September 26. In the days immediately preceding he had extensive conferences with His Eminence Luigi Cardinal Mglione, Secretary of State. On October 2, Mr. Taylor was received in audience by His Eminence, Manoel Cardinal Golcalves, Patriarch of Lisbon.

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On November 15, a Pontifical Mass was celebrated in St. Aloysius' Church, Washington, D. C., by Most Rev. Francis J. Spellman, D.D., Archbishop of New York, as a spiritual observance of the seventh anniversary of the Philippine Commonwealth. President Manuel Quezon was present. The sermon was preached by Very Rev. Robert I. Gannon, S.J., President of Fordham University.

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In a pastoral visitation of 18,000 miles, Most Rev. Francis J. Spellman, D.D., Archbishop of New York and Military Vicar, has covered 92 army posts and Navy stations and interviewed 300 Catholic chaplains, including those in Alaska and the Canadian Northwest.

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Leon Thebaud, new Minister of Haiti to the Holy See, and Jose Casas Briceno, Minister of Venezuela to the Holy See, presented their credentials early in September.

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600,000 persons attended the Fourth National Eucharistic Congress at Sao Paulo, Brazil. Most Reverend John Mark Gannon, D.D., Bishop of Erie, attended in the capacity of representative of the Hierarchy, clergy, and laity of the United States.

On October 29, Most Rev. John Mark Gannon, D.D., Bishop of Erie, promulgated new diocesan statutes, effective February 1943. The Pontifical Mass opening the Synod coincided with His Excellency's observance of his silver episcopal jubilee and his fortieth sacerdotal jubilee.

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Early in September, the sixth general meeting of the Catholic Biblical Association of America was held in Cleveland, electing Rev. Donat Poulet, O.M.I., of the University of Ottawa, president to succeed Very Rev. Thomas Plassman, O.F.M. It was announced that the first section of the revised Old Testament will be ready in the Spring of 1943.

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The fifteenth biennial convention of the International Federation of Catholic Alumnae was held in Newark, N. J., August 28-30.

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Early in October the 20th annual convention of the National Catholic Rural Life Conference was held at Peoria, Ill. Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, was renamed honorary president and Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, was reelected president. Rt. Rev. Msgr. Luigi Liguitti was elected recording secretary.

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The centennial year of Villanova College was opened on September 20 with a Pontifical Mass celebrated by His Eminence, Dennis Cardinal Dougherty. The sermon was preached by Most Rev. Gerald P. O'Hara, D.D., Bishop of Savannah-Atlanta.

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On November 26, the centenary of the founding of Notre Dame University was celebrated with a Pontifical Mass, at which the celebrant was Most Rev. John F. Noll, D.D., Bishop of Fort Wayne. The sermon was preached by Rt. Rev. Msgr. Fulton J. Sheen.

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Most Rev. Francis J. Monaghan, D.D., fourth bishop of Ogdensburg, died on November 13 at the age of 52. He became Coadjutor Bishop of Ogdensburg June 29, 1936, and succeeded the late Bishop Joseph H. Conroy at the latter's death March 20, 1939.

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Most Rev. Martin Tritschler Cordoba, Archbishop of Yucatan, died in Merida at the age of 74.

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On October 17, His Eminence, Sebastiano Cardinal Leme da Silveira Contra, Archbishop of Rio de Janeiro, died at the age of 60.

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On August 22, Most Rev. Aloysius M. Benziger, O.C.D., formerly Bishop of Quilon, India, and Titular Bishop of Antinoe, died in Trevadrum, India, at the age of 88.

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Most Rev. Noah Tacconi, former Vicar Apostolic of Kaifeng, China, is dead at the age of 69.

DIGNITIES

Most Rev. Edward F. Hoban, D.D., Bishop of Rockford, Ill., has been appointed Coadjutor Bishop of Cleveland with the right of succession. He is succeeded in Rockford by Most Rev. J. J. Boylan, J.C.L., Ph.D., D.D., Vicar General of the Diocese of Des Moines. Most Rev. Leo Binz, Ph.D., D.D., formerly secretary of the Most Rev. Apostolic Delegate, has been appointed Coadjutor Bishop with the right of succession and Apostolic Administrator of the Diocese of Winona. Most Rev. Martin J. O'Connor, J.C.D., D.D., Vicar General of the Diocese of Scranton, has been appointed Titular Bishop of Thespia and Auxiliary to Most Rev. William J. Hafey, D.D., Bishop of Scranton.

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Most Rev. Augustine Danglmayr, Auxiliary Bishop of Dallas, was consecrated on October 7 by the Most Rev. Apostolic Delegate. The co-consecrators were Most Rev. Joseph P. Lynch, D.D., Bishop of Dallas, and Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago. Most Rev. Robert E. Lucey, D.D., Archbishop of San Antonio preached. The Most Rev. Apostolic Delegate spoke at the civic reception.

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On October 22, Most Rev. Ambrose Senyshyn, O.S.B.M., was consecrated Titular Bishop of Maina and Auxiliary to Most Rev. Constantine Bohachevsky, Bishop of the Ukrainian Greek Catholic Diocese of the United States. The co-consecrators were Most Rev. Basil Takach, Bishop of the Greek Rite Diocese of Pittsburgh, and Most Rev. Vladimir Ladyka, Bishop of the Ukrainian Greek Catholic Diocese of Canada. The ceremony took place in Chicago.

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His Eminence, Rodrigue Cardinal Villeneuve, Archbishop of Quebec, received the honorary degree, Doctor of Laws, at the autumn convocation of Queen's University in Kingston, Ontario.

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Very Rev. Francis J. Schenk, J.C.D., has been appointed Vicar General of the Archdiocese and rector of the Cathedral in St. Paul.

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Very Rev. Msgr. Luigi Raimondi has taken up his position as secretary to the Most Rev. Apostolic Delegate.

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Rev. Donald M. Carroll, J.C.D., of the Archdiocese of Chicago, has been appointed a secretary of the Apostolic Delegation.

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Rev. Francis X. Desmond, C.M., was installed on October 29 as rector of Mount St. Mary's Seminary, Emmitsburg, Maryland, by Most Rev. Michael J. Curley, D.D., Archbishop of Baltimore-Washington.

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Very Rev. John Louis Collignon, O.M.I., rector of St. Eugene's Scholasticate, Natick, Mass., has been named Bishop of Les Cayes, Haiti.

Most Rev. Justin Simonds, Archbishop of Hobart, Australia, has been named Titular Archbishop of Antinoe and transferred to the Archdiocese of Melbourne as Coadjutor with the right of succession to Most Rev. Daniel Mannix. Most Rev. Maurice Despatures, Bishop of Bangalore, India, has been named Titular Bishop of Assus.

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Most Rev. Joao Bautista Muniz, C.SS.R., has been named Bishop of Barra de Rio Grande, Brazil.

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Most Rev. Miguel Angel Machado has been appointed Bishop of San Miguel, El Salvador, and Most Rev. Benjamin Barrera, Titular Bishop of Sabadia and Auxiliary Bishop of Sant' Anna, El Salvador.

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Very Rev. Ildebrando Vannucci, O.S.B., Abbot of St. Paul without the Walls, has been named Titular Bishop of Sebaste in Cilicia.

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Most Rev. Joao de Deus Ramalho, S.J., superior of the Jesuit missions of Shiuhing, has been named Bishop of Macao, Portuguese East Indies.

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The Prefecture Apostolic of Fongsiangfu, Shensi, China, has been elevated to a Vicariate and the Prefect, Rev. Filipo Wang Tao Nan has been named Titular Bishop of Atribi. Rev. Paul Ro has been named Apostolic Administrator of the Vicariate Apostolic of Seul, Korea. The Prefecture Apostolic of Gao, French West Africa, has been established and entrusted to the White Fathers.

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A Vicariate Apostolic has been created at Reyes, Bolivia, and assigned to the Redemptorist Fathers.

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Rev. Patrick H. McDermott, pastor of Immaculate Conception Church, Clarksburg, W. Va., has been named a Domestic Prelate.

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Rev. Howard J. Carroll, S.T.D., assistant general secretary of the National Catholic Welfare Conference, was named a Private Chamberlain early in August.

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Georgetown University conferred the honorary degree of Doctor of Military Science on Admiral William D. Leahy, Chief of Staff to President Roosevelt and former Ambassador to Vichy.

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Very Rev. Joseph M. Egan, S.J., has been named President of Loyola University, Chicago.

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Dr. George Speri Sperti, a director of the Institutum Divi Thomae, has been awarded the annual Catholic Action Medal by St. Bonaventure's College.

THE CANON LAW SOCIETY OF AMERICA

The fourth annual meeting of the Canon Law Society of America was held in New York City on November 15, 1942, at 3:30 P. M. It came to a close with the participation of the members in the dinner-meeting of the National Reunion of the Alumni and Friends of The Catholic University of America at the Hotel Pennsylvania at 8:00 P. M.

Organized in Washington, D. C., in the jubilee year of the Catholic University of America, 1939, at the invitation of the University's Rector, the Society has drawn to its membership priests and laymen throughout the United States and Canada. It serves the purpose of an interchange of canonical discussions along with the mutual benefits derivable therefrom. The membership now enlisted in the Society exceeds 300.

With Monsignor James H. Griffiths, Vice-Chancellor of the Diocese of Brooklyn, presiding at the meeting in his capacity of President of the Society, and with the Most Rev. Joseph H. Albers, Bishop of Lansing, and the Most Rev. Thomas A. Connolly, Auxiliary Bishop of San Francisco, attending as honored guests, the Very Rev. Robert E. McCormick, of the Board of Governors of the Alumni Association, extended to the Society a pledge of welcome on the part of the National Reunion. Thereupon the President gave a short report of the regional meeting which was held in New York on June 9, 1942, by the members of the Society resident along the Atlantic Seaboard. He pointed to the profitable discussion which was occasioned by the paper in which Dr. Adrian Kilker of Philadelphia treated of the limits within which parties may have the right of impugning the validity of their marriage when the hindrance of its validity resulted from their own guilt, culpability or negligence. Monsignor Griffiths indicated the additional clarification given to the law on this mooted point by a recent reply of the Code Commission. He expressed the desire that the New York regional meeting might serve for other parts of the country as an example of the timeliness and of the potential profit of similar discussions.

Dr. Francis B. Donnelly, of Immaculate Conception Seminary, Huntington, Long Island, then presented to the assembled group of about 75 members his paper on how the question of legal presumption for validity affects a second marriage undertaken in the face of the existence of a doubtfully valid prior union. Both doubts, that is, the doubt concerning the continued existence of an earlier valid union, and also the doubt concerning the assumed validity of an existing prior union, were given full consideration. This led to the ultimate discussion on whether the sentence "*non constare de invaliditate prioris vinculi*" could, in the absence of further legitimate appeal against it, with logical sequence lead to the sentence "*constare de invaliditate subsequentis matrimonii*". It was recognized that in this point a sharp distinction would always have to be observed between the question of the doubtful existence of an assumed valid union on the one hand, and the question of the doubtful valid status of an existing union on the other hand. The assembled members agreed that it was in light of this essential distinction that a solution would have to be sought.

With the conclusion of the open floor discussion on Dr. Donnelly's paper the Chair called upon Dr. Clement Bastnagel for the Treasurer's report. The Treasurer reported that the Society's expense during the past year in the purchase of 3,325 copies of 21 different dissertations and the cost of mailing them to subscribers along with the costs incidental to the exchange of correspondence and the sending of notices amounted to $1,056.94. Income during the year amounted to $1,530.50. The favorable balance of $473.56 added to the $663.54 balance on hand at the beginning of the year left a current balance of $1,137.50 in the Society's treasury. Of this amount $1,032.50 was bearing interest since June 1, 1942.

With its current assets the Society still had to meet the cost of 2,750 copies of 17 dissertations to be delivered to the Society for distribution among its members. In the year 1940-1941 the Society had obtained 1950 copies of 11 dissertations for distribution, and in the year 1941-1942, 3,325 copies of 21 dissertations. 2,750 copies of 17 dissertations were still to be paid for and distributed. It was estimated by the Treasurer that the Society was financially able out of its current assets to meet the cost connected with the distribution of the copies which were still to be delivered to those who had subscribed for them.

For the future, as in the past, members of the Society who paid a $2.00 membership fee would be entitled to select a copy of as many as five different dissertations of the number that would appear during the current scholastic year in the School of Canon Law at the Catholic University. Members who paid a fee of $7.00 would be entitled to receive a copy of all the dissertations that appeared in the current scholastic year, provided only that the total number did not exceed 20 dissertations. Copies of dissertations above that limit were to be priced at 50 cents apiece. In the spring of 1943 a list of the prospective Canon Law dissertations will be circulated among the members of the Society to enable them to make their selection, and to subscribe the corresponding price if advance payment has not already been made.

From a joint ballot on which appeared the names of Monsignor Floyd Begin of Cleveland and of Fathers Timothy Champoux of Springfield, Mass., Eugene Dooley, O.M.I., of Newburgh, N. Y., James Kelly of New York, Francis Wahl of Philadelphia and Robert Arthur of Washington, D. C., as candidates, Father James P. Kelly was elected as the new President, Father Eugene Dooley, O.M.I., as the new Vice-President and Father Francis Wahl as the new General Secretary. On a joint ballot on which appeared the names of Fathers John Costello of New York, Francis Donnelly of Brooklyn and Gerald Ryan of The Catholic University as candidates for the office of Recording Secretary, and the names of Fathers James McVann, C.P., Father Clement Bastnagel and Dr. Brendan Brown, all of Washington, D. C., as candidates for the office of Treasurer, Father Francis B. Donnelly was elected as Recording Secretary and Father Clement Bastnagel as Treasurer.

The newly elected President enlisted a favorable answer from the Very Rev. Stephen C. Gulovich, Chancellor of the Greek rite Pittsburgh Diocese, relative to the invitation extended to him to prepare for the next annual meeting of the Society a paper dealing with some distinct phase of matri-

monial legislation in force among the Oriental rites. The assembly tendered Dr. Gulovich a vote of thanks for his gracious acceptance of the invitation.

The President then announced to the Society that in all likelihood there could be worked out a plan that would ensure the holding of a regional meeting in New York early in the year 1943, and he further expressed the hope that other parts of the country could follow suit in a similar venture.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. (a) Date: October 28, 1942

(b) Title: The Evolution of the Roman Senate

(c) Author: Dr. Edson L. Whitney, Professor of Economics at National University, School of Economics and Government.

(d) Abstract: Dr. Whitney considered the mythological origin of the Roman Senate, its early functions and growth, its working at the time of the change from the Republic to the Empire, the causes of its decline during the formative period of the Empire, its contact with would-be reformers and demagogues, its subsequent servility to the emperors with occasional efforts at independence, and its final decline.

Comment by Dr. Martin R. P. McGuire, Dean of the Graduate School of The Catholic University of America.

II. (a) Date: November 23, 1942

(b) Title: The Influence of Roman Law Upon the Development of International Law

(c) Author: Dr. Angelo P. Sereni, a lecturer at the New School of Social Research of New York City.

(d) Abstract: Dr. Sereni brought out the beginnings of International Law in Europe, dating back to the eleventh and twelfth centuries. The first jurists who expounded a legal system of international relations were the Glossators and Post Glossators. They applied the Roman conception of ownership of land to the notion of sovereignty and applied, also, rules governing contracts, *mandatum*, and succession *mortis causa* to treaties, ambassadors and state succession, respectively.

Comment by Dr. Herbert Wright, Professor of International Law and head of the Department of Politics, The Catholic University of America.

The Concilium for 1942-1943 consists of the following:

Dr. Stephen G. Kuttner, *Magister*
Dr. Brendan F. Brown, *Scriba*
Dr. Vladimir Gsovski
Dr. Walter L. Moll
Dr. Robert J. White
Dr. Francis G. Lardone